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The 192

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The 192

GOVERNMENT OF INDIA.

LEGISLATIVE DEPARTMENT.

A

COLLECTION

OF

NOTES AND MINUTES

BY

THE HONOURABLE SIR MIAN MUHAMMAD SHAFI,
K.C.S.I., C.I.E.

(Law Member of the Council of the Governor General.)

1923—1924.

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CONFIDENTIAL.

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No. 1.

AMENDMENT OF THE MARRIED WOMEN'S PROPERTY ACT, 1874.

(9th January, 1923.)

In P. Balamba *vs.* K. Krishnayya and others (I.L.R. 37, Mad. 483) a Full Bench of the Madras High Court ruled that section 6 of the Married Women's Property Act (III of 1874) applied to a case where a Hindu male effected a policy of insurance on his own life expressed on the face of it to be for the benefit of his wife, or his wife and children, or any of them, and by virtue thereof a trust was created in favour of the beneficiaries in regard to the policy amount. On the other hand, a Division Bench of the Bombay High Court in Shankar Vishvanath Vheh and other *vs.* Uma Bai (I.L.R. 37, Bom. 471) and a Division Bench of the Calcutta High Court in Ishani Dasi and others *vs.* Gopal Chandra Dey and others (20, C.L.J., 44) held the view that section 6 of the Married Women's Property Act, had, by virtue of section 2 thereof, no application whatever to the case of Hindus and, in consequence, the Hindu wife or children for whose benefit an insurance might have been effected by a Hindu could not take advantage of the provisions of section 6. A conflict of decisions having thus arisen with regard to a statutory provision Mr. Kamat seeks to remove the bewildering effects of such conflict in the manner proposed in the Bill, motion for the introduction of which (as also for reference to a Select Committee) has already been carried in the Legislative Assembly. The question upon which I understand I am called upon to express my opinion is that of the attitude which Government should adopt in relation to this Bill.

2. To me it is perfectly clear that, in view of the conflict of decisions referred to above, it is essential that the Legislature should take the necessary steps in order to place the law on a sound and equitable basis in order that all doubt with reference to this important matter may be completely removed. Insurance policies in which Hindus and Muhammadans seek to create a benefit in favour of their wives and children in India are on the increase and, in consequence, in view of the fact that a large section of our Indian population on the one hand and the various

Insurance Companies on the other are obviously affected by the provision of the law with reference to which doubts have arisen in consequence of this conflict of decisions, it seems to be essential that legislation should be undertaken in order to settle the problem on a satisfactory basis. The question for my opinion is not one of the correctness of the view adopted by the Madras High Court on the one hand or the Bombay and the Calcutta High Courts on the other. If that were the case, I should personally have no hesitation in agreeing with the view adopted by the Madras High Court. It will be noticed that the arguments advanced by Sir Sankaran Nair and Mr. Justice Sadasiva Ayyar in their referring orders and by Sir Arnold White, who delivered the principal judgment in the Full Bench decision, have not really been met by the learned Judges either in the Bombay or in the Calcutta judgment. It seems to me that those arguments, which I need not reproduce in this note, are really unanswerable and, in consequence, the view taken by the Madras High Court appears to me to be correct.

3. But, as I have said, the real question before us is not whether this view or that view of sections 2 and 6 of the Married Women's Property Act of 1874 is correct or otherwise. This conflict of decisions having arisen, it seems to me to be necessary to undertake legislation in order to remove the resulting uncertainty and doubt in the law. Mr. Kamat seeks to remove it in the only way which appears to me to be consistent with equity, justice and good conscience. The objections put forward by the Life Offices Association appear to me to be unjustifiable and in any case inadequate. I am not prepared to admit the existence of the alleged difficulties and delays which, it is feared, would arise in settlement of claims under such policies ; nor am I convinced that this would tend to operate against the popularisation of life assurance among Indians. To me it is obvious that the difficulties and delays, if any, would arise only in exceptional cases, and I see no reason whatever to justify our abstaining from undertaking the necessary modification calculated to remove uncertainties in the existing law to the benefit of the vast majority of the insuring public as well as the Insurance Companies simply because there might be exceptional cases involving difficulties or delays in their final settlement. Nor am I prepared to admit that this amendment of the law would tend to operate against the popularisation of life assurance among the Indians affected. On the contrary, it seems to me to be perfectly clear that once we have placed it beyond all dispute that Section 6 of the Married Women's Property Act, 1874, applies to such insurances, there will obviously be an inducement to Indians to enter into such insurances on an increasing scale ; and, from the point of view of equity, it seems to me that Section 6 should be held applicable to the case of Hindus and Muhammadans. Indeed, I see no reason whatever

in such cases to make any distinctions on the ground either of religion or race. The object of the provision embodied in Section 6 being obviously beneficial to the public, the provision itself being just and equitable, it seems to me that an amendment of this Act calculated to make it clear that insurances made for the benefit of their wives and children by Hindus, Muhammadans, etc., fall within the purview of that section and, in consequence, carry with them the rights and privileges mentioned in that section, is desirable as well as justified. Section 2 of the Act in express terms applies to *married women* and, in consequence, as was held by Sir Arnold White in the Madras case, while all the other sections of the Married Women's Property Act fall within it, Section 6, which deals with policies of insurance effected by *married men*, ought to be treated as outside the purview of the former section.

4. For these reasons I am of opinion that the Government should, instead of opposing Mr. Kamat's Bill, afford every facility and help to the Honourable Member to bring about the amendment in the law which he seeks to introduce.

No. 2.

APPLICATION FROM MESSRS. S. K. ELAHI AND MAHBUB ELAHI FOR PERMISSION TO SUE THE MAHARAJA OF NABHA.

(19th January, 1923.)

(Legislative Department unofficial No. 52 of 1923.)

HAVING gone through the various documents submitted by the petitioners along with their application, including the list of articles supplied, I am constrained to hold that this is not a case in which, under the law as it stands at present, permission can be granted to the petitioners to institute this suit. His Highness the Maharaja of Nabha owns a number of residential houses and other buildings called the Nabha Estate, situate below the Railway Station and within the municipal limits of Simla. According to the statement contained in para. (1) of the petitioners' application, submitted through one of the leading Vakils of Simla, they supplied to the agent of the Maharaja from time to time various " building and repairing materials ". Of the total amount due on account of these materials a sum of Rs. 2,670-14-3, according to the petitioners, remains unpaid in spite of repeated reminders, and it is for the recovery of this sum that they ask for the consent of the Governor General in Council to institute a suit against the Maharaja of Nabha. In para. 2 of their application it is claimed that the case falls within the purview of clause (*c*) of sub-section (2) of Section 86 of the Code of Civil Procedure.

2. According to Section 86 (2) the consent required under this section for the institution of a suit against a Ruling Prince " shall not be given unless it appears to Government that the Prince..... "

> " (*c*) is in possession of immoveable property situate within those limits (*i.e.*, of jurisdiction of a competent Court) and is to be sued *with reference to such property,* or for money *charged thereon.*"

3. Now, assuming that the balance claimed by the petitioners is due on account of building and repairing materials supplied to the agent of the Maharaja for the Nabha Estate, it is, to my mind, perfectly clear that the suit would, nevertheless, be of the nature of a suit for value of articles supplied and *not a suit with reference to immoveable property or for money charged thereon.* The language of the sub-section with which we are concerned is clear and emphatic and, therefore, the consent asked for cannot be granted in this case.

4. It seems to me that the law as it stands at present, is, in so far as the interests of British subjects are concerned, in

the highest degree inequitable. Under clause (*b*), sub-section (2) of Section 86, a Ruling Prince may be sued in a Court of competent jurisdiction where, by himself or through another, he trades within the local limits of the jurisdiction of such a Court, and yet if he owns immoveable property within such limits and refuses to pay for work done on or articles supplied in connection with such property, the Governor General in Council is precluded from giving his consent for institution of a suit against him for recovery of the amount due. Where a Ruling Chief or Prince owns immoveable property in British India, his position surely is at least analogous to that of one who trades in India. Possession of property carries with it rights as well as obligations and if a Ruling Chief may institute a suit to enforce a right (see Section 84) surely he should be liable to a suit by a British subject to enforce obligations arising out of ownership of property in British India. Where a Ruling Chief or his Agent purchases articles or goods made use of in erecting buildings on land owned by him in British India, or in improving or repairing the existing buildings, he ought, in law and in equity, to be made to pay the value of what obviously is calculated to enhance the value of his property situate in British territory. The absence of a provision in Section 86 enabling the Governor General in Council to give his consent to the institution of a suit in such cases even where wilful default is committed, is obviously unjust, inflicts unwarranted injury on British subjects and should, in my judgment, be remedied by an amendment of this section.

No. 3.

MAMDOT GRANT TO THE " MUSLIM OUTLOOK ".

(22nd January, 1923.)

As regards the Punjab case, the facts are as follows :—

In reply to a question asked by Raja Narendra Nath, M.L.C., in the Punjab Legislative Council at its meeting held on the 9th November last, the Hon'ble Sardar Bahadur Sardar Sundar Singh Majithia stated that a contribution of Rs. 5,000 had been made from the funds of the Mamdot Estate to the " Muslim Outlook " with the approval of the Financial Commissioner. He further stated that the amount paid last year was *a donation on behalf of a Muhammadan Rais to a paper devoted to Muhammadan interests.* It appears that my Hon'ble Colleague, Mr. B. N. Sarma, wishes the legality of this action to be examined, and the case has therefore been referred to this Department for opinion.

* * * * * *

2. I agree with the Joint Secretary in holding that the mere omission in the rules does not bar the making of this donation, provided it is within the purview of the Punjab Court of Wards Act, 1903. Now, according to Section 23 of the Act, the Court of Wards may " from time to time regulate the expenses to be incurred in the supervision, care and management of *the wards* and properties under its superintendence, and generally in carrying out all or any of the purposes of this Act, and may order that *such expenses,* or *any of them*..... *and all contingent and other expenses whatsoever which it shall consider requisite,* be charged against such property generally ....." Again, under Section 25, sub-section (1), " The Court of Wards may from time to time determine what sums shall be allowed in respect of the expenses of any ward....."

3. It is obvious to my mind that donations to promote objects of public or communal good made on behalf of a ward form part of the expenses of that ward. There is nothing unusual in wealthy noblemen and citizens making donations for such purposes. That being so, for the Court of Wards to have made this donation on behalf of the Nawab, who is really not a minor, cannot be regarded as illegal. It is for the Court of Wards under Sections 23 and 25 to regulate the expenses of the ward and they have full discretion under those sections to direct payment not only of the expenses expressly mentioned therein but also of " all contingent and other expenses whatsoever which the Court of Wards may consider requisite ". In these circumstances there is, to my mind, nothing illegal in the action taken by the Financial Commissioner of the Punjab.

No. 4.

TREATY WITH NEPAL. QUESTION WHETHER THE TREATY SHOULD BE ENTERED INTO BY THE GOVERNMENT OF INDIA OR THE BRITISH GOVERNMENT.

(10th February, 1923.)

Confidential Case No. 601 of 1923. (Legislative Department unfficial No. 74 of 1923).

ACCORDING to Section 44 of the Government of India Act, the Governor General in Council may not, except in certain cases specified therein, " either declare war or commence hostilities or enter into any treaty for making war against any *Prince or State in India, or* enter into any treaty for guaranteeing the possessions of *any such Prince or State* ". From the language adopted in this section it is clear that the enactment embodied therein imposes restrictions on the power of the Governor General in Council to do certain acts or to enter into any treaty for the purpose specified therein with *any Prince or State in India.* Nepal being an independent sovereign State *outside India,* the section in question has no direct relevancy in determining the question which has been referred to us for opinion. That question must be decided with reference to general principles, recognized in International Law, regarding the competency of States to enter into treaties.

2. Looking at the question, then, from the point of view of general principles of International Law, it seems to me to be clear that it is only a sovereign State which can in its own name enter into a treaty with another sovereign State. The principle is well enunciated in Hall's International Law (Edition, 1917), Chapter X, page 335 :—

> " All States which are subject to International Law are capable of contracting, but they are not all capable of contracting for whatever object they may wish. The possession of full independence is accompanied by full contracting power ; but the nature of the bond uniting members of a confederation, or joining protected or subordinate States to a superior, implies either that a part of the power of contract normally belonging to a State has been surrendered, or else that it has never been acquired. All contracts, therefore, are void which are entered into by such States in excess of the powers retained by, or conceded to, them under their existing relations with associated or superior States."

3. The existing status of India in the British Commonwealth is that of a protected or subordinate State, and even if the fact that India is now an original member of the League of Nations and was signatory to the Treaty of Versailles, be taken into consideration, she cannot be placed on a higher status than that of a member of a federation. This being so, India is not in a position to enter into a treaty with an independent sovereign State outside her territories in excess of the powers retained by or conceded to her under her existing relations with Great Britain. In view of what has been said above, Mr. Keith is quite right when he lays down the principle that " to give the Colonies power of negotiating treaties for themselves without reference to Her Majesty's Government would be to give them an international status as separate sovereign States and would be equivalent to breaking up the Empire into a number of independent States ". I agree, therefore, with Mr. Graham in thinking that a treaty with Nepal, if negotiated, will have to be entered into between the British Government on the one hand and the Nepalese Government on the other.

4. The inference to be drawn from the language adopted in Section 44 of the Government of India Act also supports the above view. Obviously Parliament recognised that India could not enter into a treaty with an independent foreign State and even as regards treaties with Princes or States in India certain restrictions were imposed by that section on the power of the Governor General in Council. The provision embodied in this section, therefore, is in perfect consonance with the general principles of International Law.

5. For the reasons mentioned above, I am of opinion that the Government of India are not in a position constitutionally to enter into a treaty with Nepal, and that if such a treaty is to be concluded it must be between the British Government on the one hand and the Government of Nepal on the other.

No. 5.

EXTENT OF THE GOVERNOR GENERAL IN COUNCIL'S POWERS OF CONTROL OVER GOVERNORS OF PROVINCES.

(13th April, 1923.)

Legislative Department General A. Proceedings, December 1923, Nos. 1--6.

WITH a view to a "satisfactory settlement" of the difference of opinion which arose between the Secretary of State and the Government of India, as indicated in our Legislative Despatch* No. 7, dated the 26th October, 1922, the Secretary of State referred the matter to the Law Officers of the Crown. The case prepared for the Law Officers and their opinion upon the points referred to them have been transmitted to us by the Secretary of State with his confidential Despatch† No. 11, dated the 18th January last. And in view of that opinion, the Secretary of State has intimated, in para. 2 of this Despatch, that he proposes to adhere to the instructions which were conveyed in paras. 5 and 6 of his predecessor's Despatch‡ No. 11, dated the 23rd February, 1922.

The case stated for the opinion of the Law Officers sets out, "on the one hand, the contentions of the Government of India and, on the other hand, those considerations which led the Secretary of State to the view that those contentions were unsound". In para. 13, it is suggested :—

"(*i*) that the general powers of superintendence, direction and control vested in the Secretary of State by Section 2 of the Act extend to enabling him to superintend, direct and control the actions (or omissions) of the Governor General personally in exercise (or non-exercise) of any permissive power vested in the Governor General by any section of the Act, and to enabling him to instruct the Governor General as to the manner in which the Governor General shall fulfil any obligation imposed upon him by the Act which is capable of fulfilment in more than one way ; and consequently ;

(*ii*) that no distinction can be drawn in this respect between powers exercisable by the Governor General (or a Governor) personally and powers exercisable by the Governor General in Council or a Governor in Council."

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* Legislative Department Progs. A., January, 1923, No. 16.

†Legislative Department Progs. Genl. A., Decr. 1923, Nos. 1—6.

‡ Legislative Department Progs., Genl. A., Nove., 1923, No. 22.

The Law Officers were accordingly requested to advise :—

(*a*) whether, with reference to Sections 2 and 67-B. of the Government of India Act, the Secretary of State for India may give instructions to the Governor General as to the circumstances and manner in which he should exercise (or forbear to exercise) the powers conferred by the latter section ;

(*b*) whether, with reference to Sections 2 and 80-A. (3) of the Act, the Secretary of State for India may give instructions to the Governor General as to the granting or withholding of sanction to provincial legislation which is required by the latter section ;

(*c*) whether, with reference to Sections 2 and 43-A. of the Act, the Secretary of State may give instructions to the Governor General as to the extent to which, or the circumstances or manner in which, the Governor General shall exercise his discretion in the matter of making (or forbearing to make) the appointments referred to in the latter section.

In dealing with the points referred to them, the Law Officers of the Crown laid down the general principle " that Section 2 entitles the Secretary of State to superintend, direct and control the action of the Governor General except where the Act povides that a matter is in the discretion of the Governor General ". In such a case, according to them, " the Secretary of State may direct the Governor General as to the general policy which ought to guide the exercise of his discretion, but he cannot direct the exercise of the discretion in a particular way ". Accordingly, they expressed the opinion that the Secretary of State may give directions to the Governor General as to the certificate provided in Section 67-B. (1), but he cannot give him instructions to exercise or forbear to exercise the powers conferred by Section 67-B. (2). Their reply to the second question put to them was in the affirmative, and their answer to the third question followed that given in reply to the first question as stated above.

His Excellency, having expressed the opinion that this decision must be accepted, has directed the examination of the position as to the Governors' powers in the light of the opinion given by the Law Officers of the Crown, with a view to the issue of a letter on the subject.

2. According to Section 33 of the Government of India Act, the superintendence, direction and control of the civil and military Government of India is, subject to the provisions of this Act and rules made thereunder, vested in the Governor General in Council, who is required to pay due obedience to all such orders as he may receive from the Secretary of State. And, according to Section 45 (1), subject to the provisions of this Act and rules made thereunder, every local Government shall

obey the orders of the Governor General in Council * * * * * * , and is under his superintendence, direction and control in all matters relating to the government of its province. A careful examination of these two sections makes it clear that the real control of the Governor General in Council over the Governor is provided by the former section for, thereunder, the Governor General in Council is responsible for the government of the country and must, in consequence, have the power of superintendence, direction and control over the Governor of a province. Section 45 provides for the control of the Governor General in Council over local Governments. And I agree with the Secretary in holding that, except in so far as a Governor is acting as the local Government, this section does not enable the Governor General in Council to control the Governor. A comparison of the language used by Parliament in these two sections of the Government of India Act with that adopted in Section 2 relating to the powers of the Secretary of State, makes it clear that the position regarding the extent of superintendence, direction and control of the Secretary of State over the Governor General and that of the Governor General in Council over the Governor is, on the whole, analogous and is, in either case, subject to the provisions of the Government of India Act and rules made thereunder. It follows, therefore, that the principle enunciated by the Law Officers of the Crown applies, *mutatis mutandis,* to the control exercisable by the Governor General in Council over the Governor in regard to the powers vested in the latter under the Government of India Act. In other words, the provisions of the Act cited above entitle the Governor General in Council to superintend, direct and control the action of the Governor except where the Act provides that a matter is in the discretion of the Governor. In such a case, the Governor General in Council may direct the Governor as to the general policy which ought to guide the exercise of his discretion but he cannot direct the exercise of the discretion in a particular way. Bearing these principles in mind, I now proceed to deal with the various sections of the Government of India Act relevant to the point, examination of which has been directed by His Excellency, in the light of the opinion recorded by the Law Officers of the Crown.

3. Taking the various relevant sections of the Act in their proper order :—

Section 50 (2).—The repeated use of expressions such as " in the judgment of the Governor ", " he is of opinion " and " the Governor may, on his own authority and responsibility " indicates clearly that the power exercisable by the Governor, under this sub-section, is not subject to the superintendence, direction and control of the Governor General in Council [*Cf.* the Law Officers' opinion regarding Section 67-B. (2)]. Personally, I am

not pressed with the difficulty mentioned by Mr. Spence and the Secretary in their notes. It seems to me that, assuming that the opinion recorded by the Law Officers is sound, there can be no doubt of the correctness of the position stated above. The fact that the order of the Governor is, under sub-section 3, to be signed by the Governor and by the Members of Council present at the meeting, is, to my mind, indicative of Parliament's intention that the order thus given by the Governor, even though on his own authority and responsibility, is to have the force of a decision by the Local Government ; and, therefore, under Section 45 of the Act, it is only the resultant action which will be subject to the superintendence, direction and control of the Governor General in Council. This is further supported by the limitation placed upon the Governor's action by sub-section 4 of this section.

Section 52 (1).—Here, on the basis of the opinion recorded by the Law Officers, it seems to me that the power vested in the Governor under this section is subject to the superintendence, direction and control of the Governor General in Council in so far as the appointment of Ministers is concerned. But the words : " during his pleasure " are, to my mind, following the principle laid down by the Law Officers of the Crown, indicative of the fact that the Governor General in Council is not competent to order the Governor to remove a Minister from office.

Section 52 (1).—The power vested in the Governor under this sub-section is obviously removed from the control of the Governor General in Council.

Section 72-B. (1) (b).—I agree that the discretion given to the Governor, so far as extension of life-time of the provincial council is concerned, is removed from the control of the Governor General in Council by the words : " if, in special circumstances,.....he so thinks fit ". The Governor's power under clauses (*a*) and (*c*) of this sub-section are, however, subject to control on the analogy of the opinion recorded by the Law Officers of the Crown with regard to Section 67-B (1).

Section 72-B. (2).—I agree that the expression " as he thinks fit " is indicative of the Governor's power under this sub-section not being subject to control by the Governor General in Council.

Section 72-D. (2) (b).—Here I agree with the opinion recorded by the Secretary in his note above. Whether a particular case is one of emergency is a matter which is not entirely within the exclusive jurisdiction of the Governor and is, therefore, subject to control by the Governor General in Council. But when once the existence of emergency is conceded, the rest of the power exercisable by the Governor under this clause is entirely within the Governor's discretion.

Section 72-D. (3).—The power possessed by the Governor, under this sub-section, is obviously removed from control under the ruling given by the Law Officers of the Crown.

4. I agree that the language adopted by Parliament in relation to the remaining powers of the Governor under the Act does not, on the ruling given by the Law Officers of the Crown, exclude the superintendence, direction and control possessed by the Governor General in Council. On the assumption that the Law Officers are correct in the opinion recorded by them, the powers possessed by the Governor under the other relevant sections of the Act are not within his exclusive discretion and are, therefore, subject to such control. So far as this portion of the subject matter under discussion is concerned, it is unnecessary to refer to anything more than the Governor's powers under Section 72-D. (2), proviso (*a*) and Section 72-E. (1). I further agree that the proper course would be for the Government of India to address Local Governments just as in the case of the control of the Governor General's powers, the Secretary of State addressed the Government of India.

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No. 6.

TENDERING OF EVIDENCE BY AN ACCUSED PERSON IN HIS OWN BEHALF (PROPOSED AMENDMENT OF THE CODE OF CRIMINAL PROCEDURE).

(16th April, 1923.)

Home Department File No. 151 Judl. of 1923.
(Legislative Department unfficial No. 541 of 1923.)

In a country like India where accused persons are often ignorant and illiterate, where our subordinate judiciary are, not infrequently, neither highly trained nor altogether free from outside influences and where, generally speaking, the prosecution aim more at securing conviction than administration of justice, a proper solution of this problem* is not altogether free from difficulty. On a careful balancing of advantages and disadvantages, however, I am of opinion that the time has now arrived when a cautious step towards the introduction of this reform in our criminal procedure ought to be taken. Limited to proper Courts and hedged in by conditions necessary in the existing state of things, grant of this privilege, on an optional basis, to accused persons is likely to prove of benefit to the administration of justice. The contingency mentioned by Mr. W. L. Carey, in the paragraph from his Minute with which this file commences, is conceivable even in cases other than those of Europeans and the removal of the existing handicap, in the conditions contemplated, on accused persons in order to enable them, if so advised, to give evidence in their own defence, would be of advantage to the cause of justice.

2. I share the conviction entertained by Sir Malcolm Hailey that " if we introduce this procedure without the most careful safeguards, we shall actually injure the accused " and agree with him in the belief that without such safeguards " some of our less experienced magistracy may tend to convict the accused rather on the weakness of his own story, than on the strength of the prosecution ". In my somewhat extensive experience of criminal cases during 27 years of practice at the Bar, I have often come across this tendency on the part of our subordinate Magistrates even at present. I agree, therefore, that the grant of this privilege should, for the present, be strictly confined to trials in the High Courts and the Courts of Sessions. In these Courts, presided over by Judges of experience and integrity, able to regulate the conduct of trials in strict accordance with statutory rules of procedure, there is every likelihood of the disadvantages attendant on the grant of this privilege being avoided and its benefits to the cause of justice being secured.

* Proposal to give accused persons the right to give evidence on oath.

3. The provisions of Section 342, Criminal Procedure Code, should, of course, continue to be applied to cases in which the accused persons do not avail themselves of the privilege of giving evidence in their own defence and I agree that the provisions regarding the grant of this privilege should, generally speaking, follow the lines of Section 12 of Act XI of 1919 (now repealed).

4. The provision embodied in sub-section (3) of that section, however, should be so extended as to provide that, in trials by Jury or without the aid of assessors, neither the prosecution nor the Court in its summing up of the case shall comment on the failure of the accused to give evidence ; nor shall the Court or the Jury or the Assessors, as the case may be, draw any inference adverse to the accused from such failure. As has been pointed out by Mr. Tonkinson, this view was expressed by me even in connection with the section referred to above and I have always considered this safeguard essential in the conditions obtaining in India.

5. As to (*ii*) of clause (*b*) of sub-section (4) of that section, I agree with Mr. Tonkinson in holding that in this country it would be sufficient to close the clause with the words " has given evidence of his own good character ". It would, to my mind, be dangerous to permit the accused to be subjected to cross-examination simply because " the conduct of defence, etc., involves imputations on the character of witnesses for the prosecution ".

6. I agree generally in the remaining suggestions made by Mr. Tonkinson in his valuable note. In my judgment, these are calculated to place the proposed provision in our criminal procedure on a sound footing and to provide the " careful safeguards " which Sir Malcolm Hailey rightly considers are essential in this case.

7. As regards the proposal to provide definitely that the accused shall not be liable to punishment for refusal to answer a question, I am in entire accord with Messrs. Tonkinson and Wright. It seems to me that enactment of such a provision is, in the conditions obtaining at present in this country, a logical deduction from the very principles which necessitate the incorporation in our law of the adequate safeguards which it is admitted on all hands should accompany the grant of this privilege and is in perfect accord with the law as at present embodied in Section 342, Criminal Procedure Code.

No. 7.

QUESTION OF THE LEGALITY OF THE JURISDICTION EXERCISED BY GOVERNMENT IN THE INDORE RESIDENCY AREA.

(19th April, 1923.)

(Legislative Department unofficial No. 83 of 1923).

I AGREE with Messrs. Spence and Graham in holding that the *dicta* of Sir Tej Bahadur Sapru cited in the Foreign and Political Department notes, must be considered to have been pronounced only in relation to the question of the applicability to Indian States of the Fugitive Offenders (Protected States) Act, 1915. It has, over and over again, been held by various Courts in India as well as in England that, unless a point of general principle is directly in issue in a particular case, observations made by Judges even though seemingly of a general character, must be considered to have been made in relation to the particular points for decision before them and in the light of the facts of particular cases with which they had to deal. The same must be held to be true of pronouncements made by Law Members of the Government of India when dealing with particular cases referred to them for opinion. Sir Tej Bahadur Sapru's general observations in the previous case, referred to in the Foreign and Political Department notes, illustrate the danger of indulging in discussion of general principles in a manner too wide for the purposes of a particular case.

2. Under Section 1 of the Foreign Jurisdiction Act, 1890 (53 & 54, Vict., c. 37), it is lawful for His Majesty the King to hold, exercise and enjoy any jurisdiction which His Majesty had at the time of the passing of that Act in a foreign country in the same and as ample a manner as if His Majesty had acquired that jurisdiction by the cession or conquest of territory. And under Section 5 of that Act, it is lawful for the King in Council by Order to direct that all or any of the enactments described in the First Schedule to that Act, or any enactments for the time being in force amending or substituted for the same, shall extend * * * * * to any foreign country in which for the time being His Majesty has jurisdiction. That jurisdiction may, according to the Preamble of this Act, be the result of "treaty, capitulation, grant, usage, sufferance and other lawful means". "By virtue and in exercise of the powers by the Foreign Jurisdiction Act, 1890, or otherwise in His Majesty vested," an Order in Council was passed in 1902, known as "The Indian (Foreign Jurisdiction) Order in Council, 1902", which, while reproducing in its Preamble the language adopted in that of the Act of 1890, authorized the Governor General in Council to exercise, on His Majesty's behalf, any power or jurisdiction which His Majesty or the Governor General of India in Council for the time being

has within the limits of this Order and to delegate any such power or jurisdiction to any servant of the British Indian Government in such manner and to such extent as the Governor General in Council from time to time thinks fit (clause 3). And by clause 4 of this Order the Governor General in Council is authorized to make such rules and orders as may seem expedient for carrying this Order into effect, and in particular—

"(*a*) for determining the law and procedure to be observed, whether by applying with or without modifications all or any of the provisions of any enactment in force elsewhere, or otherwise ;

(*b*) for determining the persons who are to exercise jurisdiction, either generally or in particular classes of cases, and the powers to be exercised by them ;

(*c*) for determining the courts, authorities, judges, and magistrates, by whom, and for regulating the manner in which, any jurisdiction, auxiliary or incidental to or consequential on the jurisdiction exercised under this Order, is to be exercised in British India."

The Order in Council applies to India and to certain territories adjacent thereto and, by clause 6, the Interpretation Act of 1889 is made applicable to the construction of this Order. According to the Interpretation Act of 1889, Section 18, sub-section 5, "The expression 'India' shall mean British India, together with any territories of any native prince or chief under the suzerainty of His Majesty exercised through the Governor General of India, or through any Governor or other officer subordinate to the Governor General of India". It follows, therefore, that any jurisdiction exercisable by His Majesty in Council in the territories of Indian States as a result of treaty, grant, usage, sufferance and other lawful means, may be exercised by the Governor General in Council or any servant of the British Indian Government to whom such jurisdiction may be delegated.

3. Assuming, as would appear to be the case, that there is no warrant in any existing treaty or express agreement between the Government of India and the Indore State for the exercise by the Resident of the jurisdiction, the validity of which the Indore Darbar has contested the fact, nevertheless, remains that such jurisdiction has been exercised by our representative in Indore for a very long time. Indeed, according to what has been said in the letter from the Hon'ble the Agent to the Governor General in Central India, as well as in the Foreign and Political Department notes, such jurisdiction had been exercised for at least 50 years prior to the earliest protest ever made by the Indore Darbar in this connection. On the analogy of the principle relating to the presumption of grant in connection with old tenures, the origin of which is either lost in

antiquity or cannot be definitely traced back, the presumption in the present case is perfectly legitimate that the exercise of this jurisdiction is, in the present case, the result of a grant at the time when originally a Residency was established at Indore. Be it as it may, it is, at any rate, clear that this jurisdiction has, as a matter of usage or sufferance, been actually exercised by our representative in Indore for over a century. And, in consequence, it seems to me that it is not open to the Indore Darbar at present to raise any objection to its validity.

4. Coming now to the extent of that jurisdiction : In para. 14 of his letter No. 540, dated the 6th July 1874, the Minister to His Highness the Maharaja Holkar, writing to the Agent to the Governor General in Council in Central India, observed as follows : " There can, of course, be no objection whatever to the multiplication, in the Residency limits, of the houses of European officers of the British Government, or of the British Railway, British Telegraph, etc., or of European British subjects in general, over whom the Agent may legitimately exercise the right of civil and criminal jurisdiction. What I respectfully deprecate is the allowing of the *Native* houses and native population to occupy more ground ". In para. 17 of that letter, the following sentences occur : " In these limits, either the Agent himself or one of his Assistants exercises civil and criminal jurisdiction. So far as this jurisdiction concerns the servants, etc., of the Agent, and European British subjects residing within the limits, it is in conformity with acknowledged usage. But it has been stretched to the unconnected native inhabitants also," and, finally in para. 19, the Minister stated that his " present and immediate aim " was " limited to the prevention of the growth of these beyond their present magnitude ". It is clear, therefore, that as far back as the year 1874 the Indore Darbar acknowledged the existence of our jurisdiction, civil and criminal, within the Residency limits, at least, over the servants, etc., of the Agent as well as over European British subjects. In the representation now submitted by the Chief Minister of Indore (letter No. 748, dated the 31st August 1916, para. 4), it is contended that His Highness' government has not ceded civil and criminal jurisdiction to the British Government over what is called the " Indore Residency administration area ". Apart from the inconsistency in the position now adopted as compared with that set up in 1874, this contention is, in my mind, entirely untenable both in law and in fact. The principle enunciated in para. 481, sub-para. 9, of " Indian Political Practice " that " for purposes of civil and criminal jurisdiction it is probably necessary to treat British Residencies and Residency Bazars in State territory precisely as though they were similarly situated Cantonments," correctly describes the position. The area in dispute having been ceded to the British Government for purposes of establishing a Residency together with all its necessary accompaniments, the

Residency having, as a matter of fact, been established, it follows that by law as well as by usage, civil and criminal jurisdiction would, in the said area, be vested in the Governor General in Council exercisable on his behalf by the Resident and other Political Officers to whom the exercise of that jurisdiction may be delegated. It follows, as a matter of necessity, that such jurisdiction would extend over the servants employed in the Residency and for the purposes of the ordinary requirements of the colony consisting of the Residency staff, servants, etc., the establishment of a bazar within the Residency limits would be a perfectly legitimate exercise of jurisdiction over the Residency area. As was laid down by their Lordships of the Privy Council in Muhammad Yusuf-ud-Din's case (I.L.R. 25, Calcutta, 20—30) " Crime is in its essential nature local ". It follows, therefore, that the Residency authorities would have jurisdiction to deal with offences committed within the Residency area. Similarly, in cases of civil claims by and against persons residing or carrying on business with the Residency area, jurisdiction would rest in the Residency Courts. Moreover, it follows that for the purposes of the sanitary arrangements and regulation of traffic within the Residency area, it would be open to the Governor General in Council to enact or extend any law or regulation to the area in question.

5. I agree with Mr. Graham in holding that the uses to which the land set aside for the Residency may be put must rest ultimately with the Paramount Power in each case, and it would be for that Power to determine what is the legitimate use for Residency purposes. But as a result of the ruling of their Lordships of the Privy Council in Muhammad Yusuf-ud-Din's case, the position is clear that by ceding this area to the British Government for the establishment of a Residency therein, the Indore State has not deprived itself of its sovereignty over that area. This being so, it follows that the uses to which the ceded area can be put must be those which may rightly be considered as legitimate to the establishment of a Residency or other purposes agreed upon between the two parties. To my mind, the grant of land by the Residency authorities to the subjects of the Indore State having no direct connection with the Residency for purposes of building places of residence would not be such a legitimate use. To permit a new town to spring up in an Indian State within the area, ceded for the purposes of the Residency to the Government of India, for the settlement therein of the subjects of the State in question as well as British subjects having nothing to do with the Residency would, in my opinion, be an undue extension of jurisdiction on our part.

6. The legal position being as described above, it is for the Foreign and Political Department to see how far these principles apply to the particular facts of the case.

No. 8.

POWERS OF THE GOVERNOR GENERAL IN COUNCIL TO DISPOSE OF PROPERTY AND TO ENTER INTO CONTRACTS. (SCOPE OF SECTION 30 OF THE GOVERNMENT OF INDIA ACT).

(20th April, 1923.)

(Legislative Department unofficial No. 73 of 1923).

On a previous reference of this question to the Legislative Department, Sir Tej Bahadur Sapru, while discussing the meaning and scope of Section 30 of the Government of India Act in his note, dated the 24th April, 1922, observed as follows :—

> " In the case of the Governor General and local Governments, contracts may be *made* only by the Governor General or the Local Government, but provision is specially made for *their execution*. This may lead to inconvenient results, but I am forced to this conclusion upon a comparison of Section 30 with Sections 28 and 29 ; and the inconvenience should not by any means be great if the limited scope of Section 30 (1) is borne in mind. Under Section 30 (1), the Governor General in Council can sell and dispose of any real or personal estate only for the purposes of the government of India, and the Governor General in Council and any local Government can also make any contract for the purposes of this Act.....
> Section 30 (2), it will be noticed, uses the phrase ' for the purposes of the government of India ' in connection with the power of sale or mortgage, and the phrase ' for the purposes of this Act ' in connection with the power to make any contract. I do not think that the ' purposes of this Act ' are or can be different from ' the purposes of the government of India ', and if this be so, the inconvenience which may be apprehended to result from my interpretation will become very limited in its scope."

2. Later on, in that note when referring to the making and executing of contracts, he expressed the following opinion :—

> " In other words, in my opinion, the making of a contract is different from its ' execution ' under this sub-section. The result of this, no doubt, is that a contract can be *made* only by the Governor General in Council or the local Government. If an officer of

> the Government enters into an agreement, he will have first to get it sanctioned by the Governor General in Council or the local Government before the contract can be said to have been legally ' made ' within the meaning of Section 30 (1).

The opinion thus recorded by Sir Tej Bahadur Sapru was rightly taken by the Revenue and Agriculture Department to lead to the conclusions that (1) no contracts in a province can be made except by the local Government and that under the existing law, the local Government cannot delegate the power to make contracts to any one ; and (2) the local Governments cannot delegate powers to any one to execute contracts unless authorised to do so by a Resolution of the Governor General in Council. It was further noted that conclusion (1) condemned the greater part of the work of the Forest Department as at present in force as illegal and the Department expressed a hope that it would be possible for the law to be amended at an early date in order to make the necessary delegation possible. The Burma Government, having been informed of the conclusions thus arrived at, consulted their Government Advocate and Legal Remembrancer and, in view of the opinions recorded by those officers, have now approached the Government of India to reconsider their views ; and the case has again been referred to this Department with the request that the matter may be reconsidered.

3. The somewhat narrow interpretation placed upon Section 30 of the Government of India Act by Sir Tej Bahadur Sapru is, I venture to think, not justified by the language used by Parliament, ignores certain material considerations relevant to a proper construction of the law embodied in that section and is, in my opinion, inconsistent with the spirit of the Reforms as embodied in the Government of India Act.

4. According to Section 30, sub-section (1), " the Governor General in Council and any local Government may, on behalf and in the name of the Secretary of State in Council..... sell and dispose of any real or personal estate whatsoever in British India, within the limits of their respective governments, for the time being vested in His Majesty for the purposes of the government of India or raise money on any such real or personal estate by their mortgage or otherwise, and make proper assurances for any of those purposes and purchase or acquire any property in British India within the said respective limits, and make any contract for the purposes of this Act." Sir Tej Bahadur Sapru has read this section as if the words " for the purposes of the government of India " were used in connection with the words " sell and dispose of any real or personal estate." In other words, according to him, the expression " for the purposes of the government of

India " qualifies the power of sale and mortgage with which the section vests the Governor General in Council and the local Governments. A glance at the section as reproduced above makes it clear that this expression qualifies or is used in connection with the words " for the time being vested in His Majesty ".

This, it seems to me, is clear from the juxtaposition of the two phrases. Personally, I see nothing curious in the phraseology thus adopted by Parliament in this section ; but, in any case, the reasons given by Mr. Graham in paragraph 3 of his note above constitute, to my mind, convincing arguments in favour of this reading of the language used in this section.

5. Section 30 of the Government of India Act empowers the Governor General in Council and any local Government to dispose of property and to make contracts in the manner specified in that section. But the section is not exhaustive. In other words the section, having empowered the Governor General in Council and the local Governments to do certain things specified therein, does not go on to say that no other authority in India shall exercise such power, even though it may be authorised to do so by our Legislature, Indian and Provincial. In the absence of an express provision to that effect, the construction put upon the section by my learned predecessor is one calculated to make the administration of " Subjects ", Central and Provincial, almost impossible.

6. According to section 65 of the Government of India Act, " the Indian Legislature has power to make laws for all persons, for all courts and for all places and things within British India " excepting certain matters specified in sub-section 2 which, however, do not include disposal of property, real or personal, or the making of contracts. Again, by Section 80-A of the Act, " the local legislature of any province has power, subject to the provisions of this Act, to make laws for the..... good government of the territories for the time being constituting that province ". The word " government ", as has been pointed out by Sir Tej Bahadur Sapru in his note referred to above, has been judicially interpreted by Sir Lawrence Jenkins to mean " superintendence, direction and control " (Indian Law Reports, 27 Bombay, page 321). It follows, therefore, that our Legislatures have a right to empower officers carrying on the administration of a particular subject with powers to make contracts. Indeed, this power has always been exercised by our Legislatures and, as is pointed out by Sir Alexander Muddiman in his unfinished note on the previous file, " we may consider it as being thoroughly well established that the power of the legislature has been sufficiently asserted even before the Government of India Act, 1919 ". I further agree with him in thinking that " we must now construe the provisions relating

to contracts as subject to the powers of the legislature and read them also in regard to those provisions which deal with the execution of contracts as merely enacting the method by which the Secretary of State and the Government of India can contract legally, but not as necessarily excluding the making of other contracts by any other means by which a corporation can make contracts." As has been pointed out by Mr. Graham in para. 1 of his note there are various laws on our Statute Book which empower our Collectors and other officers to sell property and to make contracts ; laws which have been in existence for a considerable period. He has cited the instance of Section 62 of the Bombay Land Revenue Code. It seems to me that he is perfectly right in saying that " if Section 30 of the Government of India Act is interpreted so as to exclude the Central and Provincial Legislatures from enacting laws providing for the making of contracts by Government officers, the powers conferred by Section 65 and Section 80-A. are impaired to an extent which is entirely unreasonable in view of the fact that neither of these Sections is expressed to be subject to the provision of Section 30." As I have said above, the provision embodied in Section 30 of the Government of India Act is not exhaustive and, there being nothing in that Act which precludes the Central or Provincial Legislatures from investing other authorities with the powers mentioned in that section, it follows that the limited interpretation placed upon that section by Sir Tej Bahadur Sapru cannot be upheld.

7. Coming now to the question of delegation of power by the Governor General in Council or the local Government so far as it is relevant to the present issue : It is unnecessary for the purposes of this case to enter into a general discussion of this somewhat difficult question. But as is pointed out by Mr. Graham in paras. 4 and 5 of his note, the power of delegation in this particular class of cases is well established even by judicial decisions. And a careful consideration of the cases, decided by our Indian High Courts as well as by Their Lordships of the Privy Council, justifies the conclusion drawn by Mr. Graham in para. 7 of his note. The correct reply to this reference, therefore, is that* suggested by him in para. 2 of his note.

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* That ordinarily a statutory power conferred on one authority cannot be delegated by that authority without express provision to that effect yet with regard to non-statutory rules such delegation has the support of judicial decisions notwithstanding original effect of section 30 and that a similar view would probably be taken in the case of powers conferred by Statutes or statutory rules.

No. 9.

CODIFICATION OF THE LAW OF TORTS IN INDIA.

(3rd May, 1923.)

(Legislative Department Proceedings B., June 1923, Nos. 378-380A.C.)

It is unnecessary, for the purposes of this case, to enter into the oft-debated controversy concerning the desirability or otherwise of codification, of which Bentham on the one hand and Savigny on the other, were the chief protagonists. In India that interesting problem has passed beyond the stage of controversy. The many valuable Codes, civil and criminal, *e.g.*, the Indian Penal Code, the Criminal Procedure Code, the Civil Procedure Code, the Contract Act, etc., which have already been placed on our Statute Book, have undoubtedly been a source of immense benefit to the Judges, the legal profession and the litigating public in this country. Recognising, however, the great utility of codifying our laws wherever feasible, I am inclined, nevertheless, to think that codification of the Law of Torts in India is, at the present stage, both impracticable and inadvisable.

2. Even the English Law of Torts cannot yet be regarded as well settled in all important aspects. To use the language of Sir John Salmond " there are still some unsolved problems of far-reaching significance, which introduce such elements of uncertainty as to render impossible any complete and confident exposition of the law and to constrain the writer of a law book to deal with certain subjects in a manner which is merely provisional and speculative." (Law of Torts by Sir John Salmond, 5th Edition, Preface). That learned author instances the problems of " absolute liability for accidental harm ", " the true nature of the rule as to contributary negligence ", " responsibility for harm done by dangerous premises or dangerous chattels " and " the comparatively new and still undeveloped cause of action for intimidation, coercion, boycotting and other forms of oppressive interference with liberty of action " as questions in connection with which the English law is either still unsettled or is in what he characterises as a " far from satisfactory condition." Even that stalwart advocate of codification Sir Frederick Pollock, in his advertisement to the 11th Edition, speaks of " recent judicial discussion of *still doubtful* questions as to the test of command or persuasion, individual or collective, being lawful or otherwise." If this is true of the Law of Torts in England, how much more incomplete and unsettled in its character must this branch of the law in India be, where torts, or, as they have been well described, civil wrongs, independent of contract, must, in view of the heterogenous character of the Indian population and of the various social and religious systems under which they live, be necessarily far more wide and varied.

3. Codification in Anglo-Indian jurisprudence, according to Sir Courtenay Ilbert, means the reduction to a clear and compact and scientific form of different branches of law, whether the rules of law codified are to be found in systems of existing law (or in the customs of the country) or borrowed from systems of law of other countries. "Due regard being paid to the feelings of the people generated by difference of religion, or nation and of caste." Bearing this definition of codification as given by one of its greatest apostles in mind, the complicated character of the problem with which we have to deal in this file becomes obvious. Is our Code to be based upon the rules of English Law relating to Torts ? If so, those rules, as has been shown above, are yet far from being well-settled or complete. Are the propositions to be embodied in our proposed Code to be framed with due regard to the customs, social and religious, as well as the feelings of the Indian peoples generated by differences of caste and creed ? If so, the unsettled and incomplete character of the position apart from the difficulties of the task to which reference will be made later, is obvious. India, so far as the social customs and feelings of the people are concerned, is passing through a transitional stage. The effect of the introduction of western education in this country upon the social customs and feelings of the people is as yet in a stage of progressive development. And the conflict of religious usages and beliefs existing among the many communities in this country has necessarily a corresponding effect upon their notions regarding civil wrongs independent of contract. An attempt to codify the Law of Torts in India at this stage would, in these circumstances, be necessarily incomplete and the Legislature would, to a certain extent, have to formulate propositions based, not upon well-settled principles of general applicability to all sections of the Indian population but upon its own conception of what should be the right principle to adopt with reference to particular instances of civil wrongs possible of occurence in this country.

4. According to Bentham who introduced the word 'codification' into the English language, a code must be a "complete digest" and "whatever is not in it ought not to be law." Without subscribing in full to the correctness of that proposition, and recognising that our conception of what codification can effect must be more modest, I am, nevertheless, of opinion that a code, if it is to fulfil the object with which it is undertaken, should, *as far as possible,* be exhaustive in character. Even Sir Courtenay Ilbert, after laying down the four tests which, according to him, are essential for the purpose of determining in what direction the work of codification could be most usefully carried on, goes only so far as to say that the application of these tests to the law relating to torts supplies "a strong case for codifying, *at all events, some* portions of that law";

(Legislative Methods and forms, page 149). The words italicised by me in this passage are clearly indicative of a consciousness, on the part of that staunch advocate of codification, of the incomplete and inexhaustive character, in the existing circumstances in India, of a code embodying principles relating to torts or civil wrongs in this country. Piecemeal legislation in the realm of codification is, to my mind, in the highest degree undesirable, although of course, when a Code has once been enacted, subsequent modifications of or additions to its provisions may periodically be undertaken if rendered necessary by a progressive development of our legal system due to cultural and social progress. The Joint Secretary has dealt briefly with the subject under each of the four heads laid down by Sir Courtenay Ilbert by way of tests as to the feasibility of codification. I do not propose to travel over the same ground in this note. It is sufficient to say that on a consideration of the tests referred to, I have independently arrived at the same conclusion as has been come to by Mr. Wright.

5. From what has been said above, the difficulties of framing a code embodying the Law of Torts in this country can well be imagined. Even Sir Frederick Pollock, in the very first sentence of the first Chapter of his work on this branch of the law refers to its " wide and varied " character. And it is significant that an attempt made by him towards codification of the Law of Torts in 1888 proved abortive. The draft Bill prepared by that learned jurist and expert in codification was not proceeded with by reason of the almost unanimous opinion of Local Governments and judicial officers accepted by Sir Andrew Scoble, the then Law Member. A glance at that Bill reveals its incomplete character as a Code and I venture to think that the conclusion then arrived at was based on grounds which were adequate and sound. It is noteworthy that when some years afterwards Sir Frederick Pollock again undertook research in the realm of Torts, the result of his labours assumed not the form of a Digest or Code but of a Text Book on this branch of the law. Moreover, it is interesting to note that even that great jurist Sir James Fitzjames Stephen, another staunch advocate of codification, on his return to England, fresh from his codifying labours in India, while undertaking codification of the English Law of Evidence and Code of Criminal Law and Procedure, did not undertake this task. The existing situation, I venture to think, is even more complicated than that which confronted Sir Frederick Pollock in 1888, and the task, in consequence, is one of great difficulty. The Statute Law Revision Committee recognises that this branch of the law is " difficult of ascertainment " and, instead of taking that as a ground for its impracticability, considers the codification of this law advisable on the ground that " it is the one main branch of law remaining uncodified ". I venture to think that the

admitted difficulty of ascertainment of the law really leads to the opposite conclusion. Codification, however desirable, where sufficient data for its successful undertaking exist and existing conditions furnish adequate justification for launching upon that task, is not, in itself, an end to be striven for in the absence of the necessary material and in spite of complications and difficulties. It is, I presume for these very reasons that there has been no public demand for codification of the Law of Torts put forward in any part of the country. And in the absence of such a demand it seems to me to be inadvisable for Government to undertake this task.

6. In the circumstances mentioned above, I am myself inclined to think that no adequate grounds have been made out for an attempt at codification of this branch of the law. I am, however, not opposed to Local Governments and High Courts being consulted in connection with the proposal made by the Statute Law Revision Committee, should the Home Department consider it advisable to do so. But I agree with the Joint Secretary in thinking that an indication of our tentative views with regard to this matter should be given in the Circular Letter asking for their opinions.

No. 10.

RESTRICTION ON THE USE OF THE ROYAL ARMS AS A MERCHANDISE MARK ON FOREIGN GOODS IMPORTED INTO INDIA.

(8th May, 1923.)

Commerce Department, Proceedings, August 1923, Nos. 5-8.
Legislative Department (unofficial No. 300 of 1923).

THE legal position, in England as well as in India, has, in my opinion, been correctly apprehended by my Hon'ble Colleague, Mr. C. A. Innes in his note of the 14th April 1923. The statement of the law, as contained in paragraphs 3 and 4 of that note, represents correctly the conclusion deducible from the English as well as the Indian Statutes bearing upon the point in issue.

In England a false representation that any goods are made by a person holding a Royal warrant or for the service of His Majesty or any of the Royal family or any Government Department is made punishable by Section 20 of the Merchandise Marks Act, 1887. The unauthorised assumption of Royal Arms is similarly made punishable by Section 90 (2) of the Patents and Designs Act. The provisions of the latter Act were supplemented by those of Section 68 of the Trade Marks Act, 1905, which provides for a civil remedy by injunction applicable not only to the misuse of the Royal Arms but also to the use of any device, emblem or title in such manner as to be calculated to lead to the belief that the person using the same is employed by or supplies goods to His Majesty or a member of the Royal family. A perusal of these provisions in the various enactments referred to above makes it clear that it was considered necessary in England to make an express provision in statutory enactments making the unauthorised use of the Royal Arms an offence punishable under the law as well as authorising the institution of civil proceedings by way of injunction in order to prevent such user. In other words, the provisions in the Merchandise Marks Act relating to definition of " trade description " and " false trade description " and the provisions cognate thereto were not considered sufficient for the purpose of preventing a misuse of the Royal Arms. Where the manufacturer of goods imported into England from a foreign country uses Royal Arms as a merchandise mark which is, at the same time, accompanied by a counter indication of origin, it does not and, to my mind, cannot fall within the definition of " a false trade description " and its importation into England cannot be prevented. But if the use of Royal Arms is unauthorised, the sale of such goods can be prevented and is also punishable under the provisions of the law already referred to. Where a counter declaration

as to the country of origin is made along with the merchandise mark containing the Royal Arms, it is obvious that there is, in such circumstances, no misrepresentation as to the country of origin. The use of the Royal Arms, in such circumstances, may be calculated to deceive a purchaser into a belief that the manufacturer of the goods has been granted a Royal warrant of appointment to His Majesty. But, in the circumstances mentioned above, there is no possibility of deception or misrepresentation as to the country of origin.

In India the use of Royal Arms is neither an offence punishable by law nor can its use be prevented by injunction as is the case in England. It is clear, therefore, that unless the importation into India of goods manufactured in a foreign country bearing the Royal Arms as a merchandise mark can be prevented under Section 18 of the Sea Customs Act, we must resort to legislation in order to attain the object which the Board of Trade have in view. That section has been further amended by Section 10 of the Merchandise Marks Act, 1889, which adds to the list of goods mentioned in the former section " goods having applied thereto a counterfeit trade mark within the meaning of the Indian Penal Code, or a false trade description within the meaning of the Indian Merchandise Marks Act, 1889 " as those importation of which into India is prohibited by law.

Now, " false trade description ", according to sub-section (3) of Section 2 of the Merchandise Marks Act, 1889, means a trade description which is untrue in a material respect as regards the goods to which it is applied. And according to sub-section (2) of that section, so far as it is at all relevant to the point in issue, ' trade description ' means " any description, statement or other indication, direct or indirect..... ..... (*b*) as to the place or country in which, or the time at which any goods were made or produced ".

Where the Royal Arms are printed as a merchandise mark, accompanied by an express statement regarding the country of origin, it is obvious that, in those circumstances, even if Royal Arms be held to constitute a trade description, such a trade description as mentioned above would not be untrue in a material respect as mentioned is sub-section (3) in order to constitute " a false trade description ". It follows, therefore, that in such a case we cannot make use of the Sea Customs Act in order to prevent the importation of goods bearing such a merchandise mark into India. In this connection it is significant to note that Section 18 of that Act forbids the importation into India of goods made or produced beyond the limits of the United Kingdom and British India and having applied thereto any name or trade mark being, or purporting to be..... .....the name or trade mark of any person who

is a manufacturer, dealer or trader in the United Kingdom or in British India, unless the name or trade mark is, as to every application thereof, *accompanied by a definite indication of the goods having been made or produced in a place beyond the limits of the United Kingdom and British India.* If, therefore, such a declaration regarding the country of origin saves goods the importation of which is otherwise expressly prohibited in this section, *a fortiori,* where a counter declaration regarding the country of origin is printed along with the Royal Arms, the case must obviously be held as one falling outside the purview of Section 18 of the Sea Customs Act. Moreover, it is interesting to note that even in the Bill introduced in 1922 to amend the English Merchandise Marks Act, indication of origin of goods made or produced outside the United Kingdom exempts such goods from the various prohibitive provisions proposed in that Bill.

Personally I am extremely doubtful whether, even where a foreign manufacturer of any goods prints the Royal Arms as a merchandise mark unaccompanied by a counter declaration as to the place of origin, such a merchandise mark can be said to constitute " a false trade description " within the meaning of the Act. So far as I am aware, there is no rule of Constitutional Law which prevents His Majesty the King Emperor from granting a Royal Warrant of Appointment to a trader in a foreign country. Indeed, it seems to me that the trend of British policy whereby it is sought to create a state of international comity and good-will is entirely opposed to such an assumption. The very frame of the three enactments referred to above making unauthorised use of Royal Arms penal and preventible by injunction indicates that such use is not an indication of the country of origin but of Appointment by Royal Warrant to His Majesty. To my mind, at any rate, Royal Arms do not constitute a description, statement or other indication, direct or indirect, as to the place or country in which any goods were made or produced but are an indication of the fact that the manufacturer of those goods has a Royal Warrant of Appointment. This, even if untrue, would not, in itself, make it a " false trade description " within the meaning of the Act and, in consequence, the importation of goods bearing such a mark from a foreign country into India cannot be prohibited under the Sea Customs Act.

In these circumstances, it follows, in either case, that should the Government of India decide upon carrying the policy advocated by the Board of Trade into effect, this must be done by legislation calculated to bring the law in this country into line with that obtaining in England.

No. 11.

INTERPRETATION OF SECTION 24 OF THE INDIAN INCOME-TAX ACT, 1922.

(19th May, 1923.)

(Legislative epartment unofficial No. 393 of 1923).

The applicant in this case is a shareholder in two unregistered firms 'A' and 'B'. These unregistered firms were not assessed in 1922-23, 'A' by an oversight and 'B' because its operations resulted in loss. When the applicant came to be assessed in his own individual capacity, the income-tax officer assessed him not only on his income derived from other sources but also on his income from firm 'A' on the ground that his share of the profits of that firm had not already been assessed, as ought to have been the case. The applicant claims that his share of the losses from firm 'B' should be allowed as a set off in assessing him personally and asks that his case should be referred to the High Court under section 66, sub-section (2) for disposal of the question of law which arises in this case. Mr. Darling, the Commissioner of Income-tax, Punjab and North-West Frontier, was inclined to hold that the case falls under section 24 (1) and that the set off claimed ought to be allowed. Mr. Gaskell, in his note of the 10th instant is, however, of opinion that section 24 (1) so far as an unregistered firm is concerned only applies when the unregistered firm itself has income, profits or gains under one (or more) of the heads mentioned in section 6 and sustains a loss under another, in which case the loss can be set off against the income, profits or gains. He holds that if the unregistered firm sustains a loss, that loss falls on the firm as an entity and cannot be taken by the individual partner against any income, profits or gains received by him personally and appeals to the provision embodied in sub-section (2) of that section in support of this conclusion. In this opinion he is supported by Messrs. Spence and Wright in this Department.

2. Personally I am inclined to hold that the view taken of this matter by Mr. Darling is correct. Under section 24, sub-section (1), the applicant is an assessee whose total income from various sources is now being calculated for purposes of assessment. Firm 'A' not having been assessed to income-tax, the applicant's share of the profits thereof has been rightly taken into account when assessing him personally. But he claims that inasmuch as he has personally suffered a loss in the operations carried on by firm 'B' in proportion to his share in that firm, he is entitled to a set off of the amount of

that loss as against the income which he has derived from other sources. It seems to me that the claim put forward by him is both reasonable as well as in consonance with the provisions of law as embodied in section 24, sub-section (1). Mr. Gaskell's argument that section 24 (1) so far as an unregistered firm is concerned only applies when the unregistered firm itself has income, profits or gains under one (or more) of the heads mentioned in section 6 and sustains a loss under another in which case the loss can be set off against the income, profits or gains is, to my mind, hardly relevant to the issue raised by the applicant. That position may or may not be correct if the unregistered firm itself were now being assessed and had, while making profits in regard to some of its operations suffered loss in others. But that is not the case in this instance. Here the applicant is the assessee and his case is that, whatever may have been the position in regard to the unregistered firms, if the question of their assessment had been in dispute, *even firm 'A' not having been assessed*, now that he is personally being assessed to income-tax, the losses which he has incurred in firm 'B' must be set off against the income which he has made from other sources under section 24 (1). Assuming that his income from these unregistered firms falls under the head "Other sources" (see section 6), then it is clear to me that the income derived by him from firm 'A' and the losses incurred by him in connection with firm 'B' have both to be taken into account in order to see whether he has derived any income under that head. As a matter of fact taking the two unregistered firms together he has, on the whole, not only made no income at all under this head but has suffered positive loss which he seeks to set off against his income under other heads mentioned in section 6. Sub-section (2) of section 24 provides for a particular set of facts arising in a case where *the assessee is a registered firm.* Under that sub-section if the losses sustained by a registered firm under one head cannot wholly be set off as mentioned in sub-section (1), any member of such firm shall be entitled to have set off against any income, profits or gains of the year in which the loss was sustained in respect of which the tax is payable by him, such amount of the loss not already set off as is proportionate to his share in the firm. To argue from this that even where an unregistered firm, liable to be assessed, has as a matter of fact, by an oversight, not been assessed and in consequence the share of profits derived by a shareholder in that firm is being taken into account for purposes of assessment, such shareholder cannot claim as a set off against his income the share of losses which he has incurred in connection with another unregistered firm, is to my mind stretching this fiscal enactment too far against the assessee. *Section 24, sub-section (1) in its express language applies to this particular assessee* and it seems to me that his claim is reasonable.

3. But as a difference of opinion has arisen throughout these proceedings between the various authorities who have had to deal with this case, the point should, in view of the public interests involved, be decided by the High Court and the reference asked for by the applicant ought, in my opinion, to be made in order to obtain an authoritative ruling on this disputed point.

No. 12.

REORGANISATION OF THE RAILWAY DEPARTMENT.

(29th May, 1923.)

(Legislative Department unofficial No. 461 of 1923).

EITHER we intend to abolish the Railway Board or, while retaining that nomenclature, it is intended to modify its constitution by executive order. In the former case, the Railway Board having been abolished by an executive order I agree that Act IV of 1905 as well as the Notification issued under it will become spent without repeal or cancellation. In that event, all that will be necessary is to note Act IV of 1905 for repeal as spent on the occasion of the next Repealing and Amending Bill. In case, however, it is decided to retain the Railway Board with a modified constitution, the position stated above would not arise, Act IV of 1905 would continue to be in force and the powers delegated to the Board by the Governor General in Council under the Notification referred to by Mr. Hindley would remain vested in the Board in spite of the modification in its constitution.

2. The general statement of the legal position mentioned above, however, does not, to my mind, dispose of the problem as it emerges from the noting previous to the last Order in Council, or, as I understood it, during the discussions which have already taken place. Hitherto, I have apprehended the position to be as follows :—

The Ackworth Committee's Report, so far as it recommends the abolition of the Railway Board, has, as I understand it, been already accepted. According to the summary, dated the 23rd March 1923, the proposed reorganization of the Railway Department contemplates the substitution for the present Railway Board of a Commission consisting of the Chief Commissioner and three Commissioners for technical, general and financial subjects. And according to Mr. Innes' note of the 26th instant it is clear that the Financial Commissioner will have a special position. He must be consulted on proposals involving expenditure and can always submit a case to the Hon'ble the Finance Member. Subject to this reservation, it is desired to concentrate responsibility in the Chief Commissioner and to make him solely responsible, under the Member of Council for Railways, for arriving at decisions on technical questions and for advising the Government of India on matters of railway policy. The Railway Commissioners will assist the Chief Commissioner in

the disposal of important cases but will have no right to be consulted. When the Chief Commissioner does consult them, he will have power to overrule them. The head organization, thus constituted, of the Railway Department will be called the Railway Commission. In these circumstances, it seems to me to be clear that, should these changes be carried out by executive order, Act IV of 1905 will cease to have any force and, therefore, the question how far and in what manner the powers vested in the Governor General in Council under the Railway Act of 1890 can be delegated to the Chief Commissioner or the proposed head organization requires independent examination.

Railway Department Progs. E., June 1905 No. 168-B.

3. When the Railway Board was constituted in 1905 on the authority of the Secretary of State's Despatch* No. 65 (Railways), dated 19th August 1904, the question of delegation of powers under Act IX of 1890 was considered in the then Public Works and Legislative Departments. Prior to that period, some of the powers of the Governor General in Council under the Railway Act were delegated to local Governments, some to the Director of Railway Traffic and the rest were exercised by the Secretary to the Government of India in the Railway Department. Sir A. T. Arundel, in his note, dated the 10th January 1905, desired the advice of the Legislative Department as to how to give the necessary powers to the Railway Board and its Secretary so that it may go to work at once and that legislation may be postponed until it is seen, after practical working to what extent the Law should be revised. When the case came to the Legislative Department, the main point on which advice was sought was very carefully considered and noted on by Messrs. Sheepshanks and Macpherson as well as by Sir H. E. Richards, the then Law Member. It was ruled that under the Railway Act, 1890, the Governor General in Council had no power to delegate his functions to any person or body save a Local Government (Section 144) and, therefore, could not delegate them to the Board without special legislation. Accordingly, Act IV of 1905 was passed enabling the Governor General in Council to invest the Railway Board, either absolutely or subject to conditions with all or any of his powers or functions under the Act with respect to all or any Railways. Having gone carefully through the Indian Railways Act, 1890, I am decidedly of opinion that the view of the law taken during the proceedings antecedent to the passing of Act IV of 1905 was perfectly sound. The Governor General in Council may, under Section 4 of Act IX of 1890, appoint the Chief Commissioner as Inspector

of all Indian Railways ; in which case, the latter can exercise all powers mentioned in Chapter II of that Act. The Chief Commissioner may also be appointed as Secretary to the Government of India in the Railway Department ; in which case, any notice, determination, direction, requisition, appointment, expression of opinion, approval or sanction to be given or signified on the part of the Governor General in Council, for any of the purposes of, or in relation to, the Indian Railways Act 1890 or any of the powers or provisions therein contained shall be sufficient and binding if in writing signed by him. And it will be open to him to exercise, as a matter of inter-departmental arrangement, such powers as may justifiably be delegated to him by the Member in charge. But with regard to the powers specifically exercisable by or vested in the Governor General in Council by Statute his position can only be that of an adviser to Government, the final orders in such cases being passed by the Member in charge subject to the Rules of Business regarding the submission of cases to His Excellency, unless legislation is undertaken to provide for delegation to him of powers vested in the Governor General in Council.

4. The proposal to name the headquarters organisation as a Railway Commission is, if not entirely unconstitutional, certainly objectionable, in view of the provisions embodied in Chapter V of Act IX of 1890. According to Section 26 of the Act, the Governor General in Council shall, as occasion may, in his opinion require, appoint a Railway Commission which must be constituted, as therein laid down. To designate the headquarters organisation, constituted, for a purpose and in a manner entirely different from that laid down in the Act, is, to my mind open to serious objection. It may, hereafter, at least result in the simultaneous existence of two Railway Commissions constituted on two entirely distinct bases and performing entirely different functions in case it may become necessary for the Governor General in Council to exercise the powers vested in him under the section referred to above.

No. 13.

EXTENT OF THE GOVERNOR GENERAL IN COUNCIL'S POWERS OF SUPERINTENDENCE AND CONTROL UNDER RULE 7 OF THE DEVOLUTION RULES.

(4th June, 1923.)

(Legislative Department unofficial No. 411 of 1923).

ON the three questions referred to us by the Hon'ble Sir Narasimha Sarma in his note, dated the 31st ultimo, my opinion is as follows :—

(*a*) Where a case properly falls under Devolution Rule 7 and the Governor has given his decision as to whether the matter in question relates to a reserved or to a transferred subject, his decision is final and is not subject to the power of superintendence and control vested in the Governor General in Council. This I conceive to be the result of the opinion given by the Law Officers of the Crown in the case in which the extent of the Secretary of State's superintendence and control over the Governor General was in issue.

(*b*) Where a case does not properly fall within devolution Rule 7 and the Governor, ignoring or overlooking a clear rule governing the question, assumes jurisdiction vested in him by the said Rule only in cases of doubt and gives an erroneous decision, such a case is not excluded from the power of superintendence and control vested in the Governor General in Council under the Government of India Act. The erroneous assumption of jurisdiction over a matter with reference to which jurisdiction does not, in fact or in law, exist, has always been held to be subject to the superintendence and control of higher authority. If this were not so, it would be open to a subordinate authority, by wrongful exercise of jurisdiction and thereby claiming finality for its decision, not only to reduce the power of superintendence and control of higher authority to a dead letter but also to drive a coach and four through statutory enactments and rules framed thereunder. The Parliament had a specific object in dividing provincial subjects into those reserved and transferred and in laying it down (Section 52, sub-section 3) that " in relation to transferred subjects, the governor *shall be guided* by the advice of his Ministers..... " That object

would obviously be defeated if it were to be held that even in a case where there is no room for doubt, the Governor may import the exercise of authority vested in him under Devolution Rule 7 by treating it as doubtful. I take it that one of the objects with which Parliament invested the Governor General in Council with power of superintendence and control over the Governors and Local Governments was to see that the provisions of the Government of India Act and the rules framed thereunder are duly complied with. And it seems to me that a duty is cast upon our shoulders to see that the very object with which the scheme of reforms embodied in the Government of India Act was undertaken is not defeated by Governors in Provinces assuming jurisdiction in cases of this kind in order to take cases out of the Transferred Departments when there is no real ground for such action. Were the case one not of executive but of judicial authority, there is no room for doubt that the High Court, in the exercise of its powers of superintendence and control, would set aside the judgment or order of a subordinate Court where the latter had erroneously assumed jurisdiction, should the interests of justice so require. The same principle it seems to me must be applied to the class of cases with which we have to deal in this instance.

(*c*) The Finance Department in their noting dated the 4th ultimo, Sir Malcolm Hailey in the 1st and 2nd paragraphs of his note, dated the 11th ultimo and Sir Narasimha Sarma in his note, dated the 31st ultimo, expressed a definite opinion that this was a matter for the Transferred Departments to deal with. The principles applicable to this class of cases have however been enunciated in reply to the first two questions put to us by my Hon'ble Colleague Sir Narasimha Sarma. It is for the Administrative Department to decide how far and in what manner the facts of this case justify the application of those principles.

No. 14.

I—III.

NATURE AND SCOPE OF THE GOVERNOR GENERAL IN COUNCIL'S POWERS UNDER SECTION 401 OF THE CRIMINAL PROCEDURE CODE. GOVERNOR GENERAL'S PREROGATIVE OF PARDON.

I.

(5th June, 1923.)

THE question raised by my Hon'ble Colleague Sir Malcolm Hailey in his valuable note is, from the point of view of both Government and the general public, of considerable importance and I have read the interesting literature bearing upon it as collected in this file, with care and attention. Speaking generally of all the interesting opinions on this question, expressed by the various Home and Law Members from time to time, that recorded by Sir George Lowndes in the note reproduced *verbatim* by my Hon'ble Colleague is the one with which I find myself in complete accord.

2. Section 401 (1) of the Code of Criminal Procedure (Act V of 1898), to which alone it is necessary to refer in this connection, runs as follows :—

> " When any person has been sentenced to punishment for an offence, the Governor General in Council or the local Government may at any time without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced. "

It will thus be seen that the power of suspending the execution of a sentence or remitting the whole or any part of the punishment to which any person has been sentenced, vested in the Governor General in Council under this section, is not hedged in by any conditions or limitations. In other words, that power is, by Statute, absolute, to be exercised by the Governor General in Council as he thinks fit in view of the circumstances of the particular case which may be under consideration. I am, therefore, in entire agreement with Sir George Lowndes when he says that " the Government of India under this section are merely exercising a statutory power of revising sentences conferred on them by the law of the land, and having exactly the same legal sanction as the powers conferred on a Judge " by the Code of Criminal Procedure. The exercise by the Governor General in Council of the power with which he is invested under the section referred to above is, no doubt discretionary but, as has been rightly observed by Sir George Lowndes " the discretion is definitely vested in

the executive by the law and they are bound to give 'full and anxious consideration' (to use Lord Crewe's words) to every case in which an appeal is made to them." In these circumstances, I agree with him that "it would be wrong for us to lay down artificial rules fettering the exercise of this discretion, but at the same time it must be exercised on sound lines."

3. The legal position is, in doubt, as described above. But, in practice, it is obvious that all cases of petitions submitted to the Governor General in Council for exercise of his power under Section 401, Criminal Procedure Code, cannot be treated alike. The Governor General in Council, in these cases, does not sit as a Court of further Appeal against the Appellate Judgments of the High Courts and cannot, therefore, be expected to scrutinise minutely the evidence in every case as if he were sitting as a Court of Appeal. The officer presiding over a Court of Original Criminal Jurisdiction has the advantage of seeing the witnesses and hearing the evidence given by them in each case. Similarly, the Court of Appeal has, generally speaking, the benefit of hearing a case fully argued on behalf of the person convicted as well as of the Crown. The Governor General in Council, on the other hand, has to form his opinion merely upon the record of the case without the advantages mentioned above. In these circumstances, it is obvious that interference by him under Section 401, Criminal Procedure Code, must, in the very nature of things, be exceptional. Where the case has been properly tried in the Original Court and the Appellate Court has, bearing in mind the duty cast upon it by law of satisfying itself that the guilt of the accused is established by the evidence on the record, confirmed the conviction, the Governor General in Council cannot, ordinarily, be expected to examine the evidence with that meticulous care which is expected of a Court of Justice. I, therefore, agree with Sir George Lowndes in holding that "in ordinary cases where the trial has been duly conducted by a competent Court and there is no question of the discovery of fresh evidence after conviction, the functions of the executive may well be limited to considering whether the facts proved justify a reduction of the sentence within the limits allowed by the law for the particular offence of which the accused has been convicted." "Within these limits", it also seems to me, "the executive are in at least as good a position as the Courts to judge dispassionately of the merits of the case." I further agree with him that this is as far as it is possible to go. In all other cases, inasmuch as discretion exists, it must be fairly exercised after giving due weight to all the surrounding circumstances.

4. I agree that the general principles enunciated should apply, *more or less*, equally to cases which come up from the Original Side of the High Court as to those in which the High

Courts sit in appeal. There is, however, in my opinion, a slight degree of difference in the standards which should be adopted in dealing with such cases. In the latter instance, the case has run the gauntlet of two Courts and the evidence on the record has presumably been carefully examined both by the Judge presiding over the Original Court and the Judges of the High Court sitting in appeal. On the other hand, where a case is tried by the High Court in the exercise of its original criminal jurisdiction, it has run the gauntlet only of one court. In these circumstances, the degree of care with which, in the latter case, the record is to be examined in the Government of India would be somewhat higher than in the case of an Appellate Judgment by the High Court.

5. I regret I am unable to agree with my Hon'ble Colleague, Sir Malcolm Hailey, in so far as he lays down that the principles enunciated should apply equally to cases in which the High Court has reversed on appeal an acquittal by a Sessions Judge. The Sessions Judge trying a criminal case with the aid of a Jury or Assessors, as the case may be, has the advantage of seeing the witnesses and hearing their evidence and also has the benefit of hearing arguments of Counsel on both sides. A High Court, reversing on appeal a verdict of acquittal, in these circumstances, takes a very serious responsibility on its shoulders. The case thus assumes an entirely new aspect. We have here a Judge who has had all the advantages attendant upon an original trial, as mentioned above, holding that the guilt of the accused is not established and, on the other hand, an Appellate Court coming to the contrary conclusion. In these cases, it seems to me that, while not usurping the functions of a court of Appeal, there is a duty cast on the Government of India to go more deeply into the case in order to satisfy themselves that the verdict of acquittal arrived at in the Original Court was rightly reversed by the High Court. In my opinion, therefore, this class of cases should be treated as somewhat exceptional and should not be held to be covered by the general principles laid down above as governing the ordinary cases in which the High Court has confirmed the judgment of the Sessions Court.

II.

(22nd August, 1923).

Home Department File No. 901-Judl. of 1924. (Legislative Department unofficial No. 690 of 1923.)

IN his note, dated the 6th instant, my Hon'ble Colleague has stated the question under reference in the following words :—" whether the Governor General possesses the general prerogative of mercy as apart from the prerogative of pardon ". In para. 2 of his note of the 30th ultimo,

my Hon'ble Colleague had, however, stated that " A somewhat interesting question has, however, arisen in the course of previous discussions : that is to say, the question whether the prerogative of mercy as such can be said to subsist as apart from the operation of Section 401 of the Criminal Procedure Code..... The prerogative of pardon is, of course, clearly provided for and exists entirely apart from Section 401 but the prerogative of mercy is different. It is an inherent power of the Crown ; it needs no legislation to confirm it and could only be withdrawn by a Statute of the Imperial Parliament. Are we to take it as certain that this power was not inherent in the Viceroy as representative of the Crown ? ". The question finally put to us for opinion by my Hon'ble Colleague in his note of the 6th instant is not, I am afraid, very happily worded ; the real question under reference can, however, be gathered from the two passages cited above being taken together and has apparently been so dealt with both in the Home Department notes as well as by Mr. Graham. The answer to this question must rest primarily on a correct interpretation of para. 5 of the Instrument of Instructions to the Governor General, read with the provisions of Section 401 of our Criminal Procedure Code. A survey of the position in the Dominions overseas may be of historical interest ; a reference to the language adopted in the various Letters Patent issued to the Colonial Governors may be of material help in the correct construction of the Indian Instrument. But the reply to the question put to us by my Hon'ble Colleague must, in the main, be based upon the powers of the Governor General as delegated to him by the Sovereign in the Indian Instrument of Instructions, construed with reference to the statutory powers, vested in the Governor General in Council under Section 401 of the Criminal Procedure Code.

2. In order to arrive at a correct solution of this problem, it is necessary to bear in mind the distinction between the nature and effect of pardon as compared with that of suspension or remission of a sentence under Section 401, Cr. P. C. A free pardon removes both *paenam et culpam* and leaves the culprit absolutely free of all infamy and stain caused by his conviction. In other words, it purges the offence itself. A suspension or remission of a sentence under Section 401, Criminal Procedure Code on the other hand, leaves the conviction untouched. What the culprit is relieved of is his liability to undergo either the whole or a part, as the case may be, of the sentence inflicted on him by the Court. He is in no way relieved of any disabilities that may otherwise attach to such conviction.

3. What is known as the " prerogative of mercy " is a personal attribute of the Sovereign or the Supreme Head of a State, vested in him, to quote the language used by Sir Henry

Maine, as "the Lieutenant of the Deity"—"Deity Incarnate" of the Hindus, "the Zil-lallah" (shadow of God) of the Muslims. And as a well-known Persian writer has said : "*Do Badshah Dar Aqleeme na gunjand*"—there cannot be two Sovereigns in one State—it is obvious that the Governor General can possess, in this respect, only such powers as may be delegated to him by the Sovereign himself. The exercise of this prerogative of mercy may result in pardon, free or conditional, total or partial remission or suspension of a sentence absolute or otherwise. By Clause 5 of the Instrument of Instructions issued by the Sovereign, the Governor General of India is authorised and empowered in the name and on behalf of the Sovereign to grant any offender convicted in the exercise of its criminal jurisdiction by any Court of Justice a pardon either free or subject to such lawful conditions as to him may seem fit. I entirely agree with what Mr. (now Sir) Alexander Muddiman said in his note dated the 5th January 1917 (*see* Progs. Home Department No. 123, April, 1917, page 4), that a conditional pardon is not the same thing as a remission or commutation under Section 401 Criminal Procedure Code. When a pardon is granted by the Governor General in the exercise of powers delegated to him by the Sovereign, subject to a lawful condition, *e.g.*, furnishing of security for good behaviour for a certain period, the pardon becomes absolute as soon as the condition is fulfilled and thereafter the culprit is purged of the offence for which he was convicted by the Court. As has been already observed above, the position in cases of remission, suspension or commutation of a sentence is entirely different. It is unnecessary, for the purposes of this case, to enter into a discussion of the fundamental question whether a Sovereign can lawfully delegate his prerogative to some one else. The fact remains that this royal prerogative has for a long time past, been delegated without question by the Sovereign to the Governors of the Dominions overseas from time to time and, on the introduction of the Montford Reforms, was first conferred on Lord Chelmsford by Our King Emperor in the Instrument of Instructions, then issued to him. The power so delegated by the Sovereign to Lord Chelmsford as well as to His Excellency Lord Reading is, in express language, confined to pardon, free or conditional as may be deemed fit in a particular case. The power of remission, total or partial, and of suspension, whether with or without conditions, vests in the Governor General in Council under Statutory Law. In these circumstances, there can, to my mind, be no doubt whatever that the prerogative of mercy, in so far as it extends to remission or suspension of sentences, cannot be exercised by the Governor General personally.

To hold otherwise would not only result in the creation of a great constitutional anomaly but would also result in clothing the Governor General with an attribute which is personal to the Sovereign himself and cannot vest in any one else except as a result of express delegation of authority from the Sovereign.

4. A glance at sub-section 5 of Section 401 of the Code of Criminal Procedure will show the validity of the conclusion arrived at above. According to that sub-section, " nothing herein contained shall be deemed to interfere with the right of His Majesty *or of the Governor General when such right is delegated to him*, to grant pardons, reprieves, respites or remissmissions of punishment ". The words italicised by me make it perfectly clear that the provisions of Section 401 of the Code of Criminal Procedure cannot be deemed to interfere with such rights of the Governor General as have been delegated to him by His Majesty in respect of the various matters mentioned in sub-section 5. The only right delegated to the Governor General is that of granting pardons, free or conditional, and inasmuch as the other rights mentioned in the sub-section have not been so granted, the necessary conclusion deducible from this enactment is that, in the existing state of the law, the powers vested in the Governor General in Council, under Section 401 (1) can be exercised by the Governor General in Council alone, and not by the Governor General personally.

5. A consideration of the language adopted in the Letters Patent issued to the Governors of Dominions overseas strengthens the conclusion which I have arrived at in the preceding paragraphs on an independent consideration of general principles as well as on a proper construction of the Indian Instrument taken together with the provisions of Section 401, Criminal Procedure Code. As has been pointed out by Mr. Keith in his work " Responsible Government in the Dominions ", Letters Patent to the Governors of the six Australian Colonies and New Zealand issued in 1892 empowered the Governors of the six Australian States and New Zealand " to grant a pardon either free or subject to lawful conditions or any remission of the sentence passed on such offender or any respite of the execution of such sentence for such periods as the Governor thinks fit ". The Letters Patent of the Colonies which form the Union of South Africa empower the Governor General to " grant a pardon either free or subject to lawful conditions or any remission of the sentence passed on such offender or any respite of the execution of such sentence for such period as the Governor General thinks fit ". Similarly, the Letters Patent issued to the Governor Generals of Canada and of the Commonwealth of Australia authorise them to " grant a pardon either free or subject to lawful conditions or any respite of the execution of the sentence of any such offender for such period as to our said Governor General may seem fit ". From a comparison of the language adopted in these various Letters

Patent with that used in the Indian Instrument of Instructions, it is perfectly clear that where the Sovereign intended to include among the powers delegated, in addition to that of pardon, those of remission, etc. ; such powers were delegated in express language. From the omission of similar delegation in express language in the Indian Instrument of Instructions, the conclusion is irresistible that the delegation in this case was intentionally confined to that of pardon, free or conditional, as to the Governor General may seem fit in a particular case. The reason for this limitation is, to my mind, perfectly clear. The power of remission or of suspension being already vested in the Governor General in Council under Section 401, Criminal Procedure Code, it was unnecessary to delegate these powers to the Governor General personally and such delegation would have created a constitutional anomaly, the avoidance of which was apparently considered desirable.

6. In the circumstances and for the reasons mentioned above, I am of opinion that while the exercise of the prerogative of mercy by the Governor General personally, as delegated to him by the King Emperor, is confined to pardon, free or conditional as the case may be, the power of remission or suspension of sentences is vested exclusively in the Governor General in Council under Section 401 of the Code of Criminal Procedure.

III.

(10th October, 1923.)

Home Department File No. 901 Judl. of 1924.
(Legislative Department unofficial No. 868 of 1923).

In his note, dated the 7th ultimo my Honourable Colleague, Sir Malcolm Hailey, has asked for reconsideration of the previous conclusions arrived at in this Department on certain grounds mentioned by him in that note. Referring to the terms of delegation embodied in the Indian Instrument of Instructions he asks :—

> " But would the terms of delegation, in themselves, and *apart from any countervailing restrictions which we may discover elsewhere in Indian conditions,* empower him also to reduce or remit sentences ? Admitting that in terms he has been given only the power to grant free or conditional pardons, does not a conditional pardon imply also the power to require a convict to serve a substituted sentence ? "

The assumption underlying the concluding portion of the question put to us by my Honourable Colleague ignores the essential nature of a pardon as distinguished from a remission or suspension of sentence. That distinction was pointed out

by me in the second paragraph of my previous note, dated the 22nd August last. According to Wharton (*see* his Law Lexicon, page 633) " the effect of a pardon is to make the offender a new man (*novus homo*), *to acquit him of all corporal penalties and forfeitures annexed to the offence pardoned* ". It is obvious, therefore, that where the essential nature of the act of mercy exercised in a particular case is, in effect, to substitute a shorter or a different sentence in lieu of that originally awarded by the Courts, the prerogative thus exercised is not of pardon but one of mercy resulting merely in the change of sentence. In other words, it is a case of remission or suspension of sentence and not of pardoning of the offence itself. The term " conditional pardon ", therefore, is entirely inappropriate to a case like this. As far as I have been able to trace, this particular phrase was first used in an Act of Parliament (7 and 8 Geo. IV, C 28). Section 13 of that Act runs as follows :—

> " And be it declared and enacted, that where the King's Majesty shall be pleased to extend His Royal Mercy to any Offender convicted or any Felony punishable with death or otherwise, and by Warrant under His Royal Sign manual countersigned by One of His principal Secretaries of State, shall grant to such Offender either a free or a conditional Pardon, the discharge of such offender out of Custody in the case of a free Pardon, and *the Performance of the Conditions* in the Case of a conditional Pardon, shall have the effect of a Pardon under the Great Seal for such Offender, as to the Felony for which such Pardon shall be so granted..... ".

To treat the substitution of a term of imprisonment in lieu of a death sentence or of any lesser sentence in the place of a higher as conditional pardon seems to me to be inconsistent with the essential nature of a pardon, which, as a result of its exercise by the Sovereign or any other authority to whom the power of pardon may be delegated, amounts to a purging of the offence itself.

2. A glance at the language used in sub-section (5) of section 401 of the Code of Criminal Procedure strengthens this conclusion. According to that sub-section " nothing herein contained shall be deemed " to interfere with the right of His Majesty or of the Governor General when such right is delegated to him, to " grant pardons, reprieves, respites or remissions of punishments ". That sub-section

distinguishes pardons from reprieves and remissions, etc., and obviously places them upon a different footing. The Indian Instrument of Instructions delegates to the Governor General only the prerogative of pardon, free or conditional, and not that of remission or respite. The Statutory Law of India vests the lesser power in the Governor General in Council. It follows, therefore, that in India it is the Governor General in Council and not the Governor General personally who can rightfully exercise that power. In this connection it is interesting to refer to what Chitty has said in his work on "The Prerogatives of the Crown", (Chapter III, at page 25,) after referring to the prerogatives of the Crown generally, he observes as follows :—

> "But the various prerogatives and rights of the Sovereign which are merely local to England, and do not fundamentally sustain the existence of the Crown, or form the pillars on which it is supported, are not it seems *prima facie* extensible to the Colonies or other British Dominions which posses a local jurisprudence, distinct from that prevalent in and peculiar to England. To illustrate this distinction the attributes of the King, sovereignty, perfection and perpetuity, which are inherent and constitute His Majesty's political capacity, prevail in every part of the territories subject to the English Crown, by whatever peculiar or internal laws they may be governed. The King is the head of the church ; is possessed of a share of legislation ; and is generalissimo throughout all his dominions ; in every part of them His Majesty is alone entitled to make war and peace ; but in countries which, though dependent on the British Crown, have different and local laws for their internal governance, the minor prerogatives and interests of the Crown must be regulated and governed by the peculiar and established law of the place."

Applying that principle to the present question, the extent of the prerogative of mercy delegated to the Governor General in the Indian Instrument of Instructions must be determined upon the proper and legitimate construction of that Instrument read together with the statutory provision embodied in section 401 of the Indian Code of Criminal Procedure.

3. The fact that we "do at times receive memorials which are of a different class", *i.e.*, memorials direct to His Excellency the Viceroy as Governor General, cannot affect the legal position. In such cases, should His Excellency be not prepared to exercise the prerogative of pardon delegated to

him by the King-Emperor the memorial ought to be treated as one under section 401 of the Criminal Procedure Code and sent to the Home Department for disposal in the ordinary course.

4. On these grounds, I am still of opinion that the conclusion already arrived at in this Department is correct and I see no reason to alter my previous opinion.

No. 15.

PROPOSED AMENDMENT OF SECTION 288 OF THE INDIAN PENAL CODE TO PROVIDE AGAINST NEGLIGENCE IN THE CONSTRUCTION OF A BUILDING.

(12th June, 1923.)

Home Department File No. 724-Judl. of 1922.
(Legislative Department unofficial No. 446 of 1923).

Section 288, Indian Penal Code, forms one of a group of sections in Chapter XIV dealing with offences affecting public safety. A careful perusal of the language used by the Legislature in that section makes it clear that the wilful or negligent omission specified therein must occur " in pulling down or repairing any building " and, in its result, must involve " probable danger to human life from the fall of that building ". It follows, therefore, that the necessary precaution enjoined by this enactment, wilful or negligent omission of which makes a person liable to the specified punishment, must be taken *while a building is actually being pulled down or repaired* in order to prevent probable danger to human life as a result of preventible collapse of the building or any part thereof. If the proposed amendment is intended similarly to make wilful or negligent omission " to take such order with " a building " as is sufficient to guard against any probable danger to human life from the fall of that building or of any part thereof " *while the building is in the course of construction*, such an amendment would, to my mind, be perfectly legitimate and could properly be made by introducing the word "constructing " before ' pulling down ' towards the commencement of the section. In that event, the section would read as follows :—

> " Whoever, in constructing, pulling down or repairing any building, knowingly or negligently omits ", etc., etc.

But if it is intended to amend the section so as to cover cases in which danger to human life, as a result of the wilful or negligent omission specified, occurs *after the building has been completed* or the stage of probable danger to human life having passed, *death or injury has actually resulted*, I agree with Mr. Wright in holding that such an amendment in Section 288 would be illegitimate, out of place and unnecessary.

2. As I have said above, Section 288 makes wilful or negligent omission of the nature specified therein, calculated to bring about certain stated results and committed during the pulling down or repairing of a building, punishable as an

offence. Any amendment of that section making such omission in connection with a proceeding of entirely different nature, which results in danger to human life after such proceeding has been completed would constitute an amendment beyond the intention and scope of the original section and would, therefore, be opposed to sound principles of legislation. Moreover, I agree with Mr. Wright in holding that, inasmuch as this proposal would seek to penalise negligent acts and omissions resulting in death or hurt or possible danger of death or hurt, the proper place for a provision to meet cases of this description appears to be in Chapter XVI of the Code. Having gone through the various sections referred to by him, I am of opinion that these cases are, by reason of the provisions embodied in sections 33 and 43 of the Code, covered by section 304-A, or sections 336-338, according to the nature of the injury actually caused in a given case ; and, in consequence, an amendment of any of these sections, in order to provide for such a case, is unnecessary. In such cases, however, as has been correctly put by Mr. Wright, mere inadvertence, while it might create civil liability, would not be sufficient to create criminal liability.

3. It is further quite true that conviction in cases of this kind would be comparatively rare, and I too entertain great doubts whether any provision of law could be designed under which the difficulties which arise in fixing criminal liability under Section 304-A and Sections 336-338 could be completely avoided. I agree, therefore, in thinking that it is, to say the least, inadvisable for us to undertake legislation covering this particular case until our existing law has, in a clear case of culpability, been found to be defective. If the various provisions embodied in Chapter XVI dealing with the consequences of rash and negligent acts do not cover the whole field of culpability resulting in death or injury, it seems to me that it would be contrary to general principles of criminal legislation to seek to amend our Indian Penal Code by providing for one isolated case of this kind.

4. As regards the second part of the *proposal, I myself am in entire agreement with the Lahore High Court in thinking that cases of this description should not be brought within the purview of criminal law and must form the subject of an action in Tort.

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*Extension of s. 288 of the Indian Penal Code, to cover cases in which the owner of a building has wilfully neglected to take precautions to prevent the fall of his building or any part thereof.

No. 16.

APPOINTMENT OF MR. BAKER AS JUDICIAL COMMISSIONER, CENTRAL PROVINCES.

(16th June, 1923.)

(Legislative Department unofficial No. 530 of 1923).

In view of the language used in Section 4 (2) of the Central Provinces Courts Act, there can, to my mind, be no possible doubt that the person to be appointed as Judicial Commissioner must be " one of the judges " of that Court. It is clear, therefore, that Mr. Baker cannot be appointed Judicial Commissioner, without first being appointed a Judge of that Court. The two notifications may, of course, issue simultaneously. I agree, further, that such notifications, if issued now, would not have retrospective effect and that the consequences of the initial defect in Mr. Baker's appointment can be remedied only by legislation. Mr. Graham, however, draws a distinction between an officiating and a permanent appointment and has, in that connection, cited Section 105 of the Government of India Act. I have grave doubts in my own mind, if such a distinction can properly be drawn in order to avoid facing the difficulty which has arisen in this case. Section 105 of the Government of India Act provides for a temporary arrangement on the occurrence of a vacancy in the office of Chief Justice of a High Court and during any absence of such a Chief Justice by authorizing the Governor General in Council in the case of the High Court at Calcutta, and the Local Government in other cases, to " *appoint one of the other Judges of the same High Court to perform the duties of Chief Justice* of the Court " until some person has been appointed by His Majesty to the office of Chief Justice of the Court, etc. The C. P. Act does not contain a similar provision. Moreover, the notification, in the present instance, appointed Mr. Baker as " *officiating Judicial Commissioner,* Central Provinces during the absence of Mr. J. K. Batten, I.C.S., on leave or until further orders ". There is, therefore, no analogy between the two cases. On handing over charge of his office to Mr. Baker, Mr. Batten, in so far as exercise of powers and performance of the duties of this office is concerned, became *functus officio* and ceased to be the Judicial Commissioner of this court. In these circumstances, it is Mr. Baker, as the person exercising the powers and performing the duties of the office, who is the Judicial Commissioner for the time being in so far as the constitution of the Court is concerned. It is obvious that there cannot be two persons holding the office of Judicial Commissioner in the Central Provinces at the same time ; and in consequence the distinction between an officiating and a permanent Judicial Commissioner cannot legitimately be

drawn in so far as Section 4 (2) of the Central Provinces Courts Act is concerned. In these circumstances, it seems to me that the safest course would be to undertake legislation to validate the judgments already passed by Mr. Baker as Judicial Commissioner, otherwise the consequences to the litigants might be very serious.

No. 17.

CREATION OF AN INDEPENDENT INDIAN BAR.

(22nd June, 1923.)

1. *Creation of an "Indian Bar" or an "Independent Indian Bar."*—The proposal for the establishment of an Indian Bar in India was first made by Lord Haldane in 1911 and was subsequently revived by Dr. (now Sir) T. W. Arnold in a Minute recorded by him on 13th July 1918 (*see* Proceedings Home (Judicial), No. 12, September 1919). That Minute was submitted in England to various persons for opinion. It is noteworthy that Dr. Arnold's proposal was, on that occasion, opposed by Mr. J. W. Hose, C.S.I., Mr. Bhupendranath Basu, Sir Lawrence Jenkins and Lord Sinha. These papers having then been transmitted to India, Sir George Lowndes recorded a Minute, dated the 26th July 1919, in which he controverted the arguments adduced by Dr. Arnold in support of his proposals regarding the removal of the distinctions at present existing in India between Barristers and Vakils concerning certain privileges enjoyed by the former. Sir William Vincent (*see* his note,* dated the 31st July 1919) was of opinion that Dr. Arnold's proposals "would not effect what he desired and would involve other results of a very serious character". He pointed out that the Indian Barrister was often very unjustly attacked and that the fact remained that even in Courts in which Barristers had no special privileges, the leading legal practitioners and those who had the best practice and made the most income were generally Barristers. About that time I was appointed Education Member in the Government of India and on the suggestion of Sir George Lowndes the case was referred to me for opinion. In the note recorded by me on that occasion (*see* pages 26-27 of the Proceedings mentioned above) I expressed my entire agreement with the views recorded by Mr. Bhupendranath Basu, Lord Sinha and Sir George Lowndes upon this proposal. The suggestions made by Sir George Lowndes were then embodied in a Circular letter which was issued to local Governments, High Courts and certain leading members of the legal profession in India for opinion. The opinions thus collected will be found in the Proceedings, Home (Judicial), No. 4, November 1920. It will be noticed that on the question of the establishment of an independent Indian Bar there was an overwhelming weight of opinion against this proposal which found only four supporters, all the remaining authorities consulted casting their vote against it. The views expressed by Lord Sinha and Mr. Bhupendranath Basu against the proposal

* *See* Home Department Proceedings, Judicial Deposit, September, 1919, No. 12.

were generally supported and the matter was finally dropped on that occasion.

I still adhere to the opinion then expressed by me with regard to this proposal. As I then said in a note recorded by me on the 2nd June 1920, after the receipt of opinions from all the authorities consulted on that occasion, " any such undertaking is not only uncalled for and unnecessary but is certain to be resented in certain quarters, sinister motives being attributed to Government should we take any action on the lines proposed by Dr. Arnold ".

In the words of Sir Norman Macleod, Chief Justice of Bombay, I do not exactly understand what is meant by the establishment of an Independent Bar in India. As was said by Lord Sinha in his Memorandum already referred to, by a " Bar " we generally understand a body of legal practitioners licensed or authorized to practice in the Law Courts. Such a professional body already exists in India, possessing certain rights and enjoying certain privileges under the Indian Legal Practitioners Act and rules framed by our High Courts. The Indian Bar consists mainly of two sections : advocates and Vakils or pleaders (I leave the gradually diminishing class called " Mukhtars " out of account). Advocates, again, in their turn, consist of two classes of legal practitioners : (*a*) Barristers who have been called to the Bar at the Inns of Court in London and (*b*) holders of Indian Law Degrees who have been raised to the status of Advocates in the various Indian provinces in accordance with the rules framed by our High Courts. In actual practice the success or failure of a legal practitioner, be he a Barrister or a Vakil, depends upon his individual merits. As I observed in my note dated the 4th September 1919, " where a man's life or personal safety is in danger, or when he stands the chance of losing his property as the result of the litigation in which he is involved, it is obvious that he will, in the majority of cases, engage the legal practitioner—Barrister or Vakil—whom he considers most efficient for the conduct of his case consistently, of course, with his own pecuniary circumstances and not because the Legal practitioner in question belongs to this or that branch of the profession.' The cheap sneers which it was the fashion many years ago in certain quarters, for reasons which it is unnecessary here to discuss, to cast against Indian Barristers on the ground that many of them were men who, being University failures or otherwise ill-educated, had proceeded to England in order to pass a comparatively easy examination qualifying them for practice in India as Barristers-at-Law with status superior to that of the local Vakil, are, at the present day, entirely out of place. The reason that they are no longer now indulged in, except on rare occasion by those who are opposed to Indian young men being

sent to England on grounds other than educational, is obvious. Since those days, rules for admission of Indian students to the Inns of Court have been entirely changed. In the old days, an Indian who had passed any public examination of a recognised Indian University could obtain admission to the Inns of Court without having to pass a further test, so that a candidate for admission who had passed even the Middle Examination of the Punjab University had the right of being admitted as a student in those Institutions. For years past, the case has been entirely different. In order to entitle him to admission at the Inns of Court, an Indian has now to be either a Graduate of any one of our recognised Indian Universities or a member of one of the Universities in England. It is clear, therefore, that any argument based upon comparative inferiority of educational qualifications before admission as a Law student between a Barrister and a Vakil no longer holds good. The various examinations held at the Inns of Court in order to qualify a candidate for the degree of Barrister-at-Law are, moreover, now comparatively more difficult and cover a wider field of study, particularly for Indian students, than used formerly to be the case. As a result of the introduction of changes, referred to above, in the rules regarding admission of Indian students to the Inns of Court, the number of Indians now proceeding to England for the purpose of being called to the English Bar has largely decreased. Indian young men who have received University education in India and who, in the very nature of things, must belong to the more respectable and wealthier classes in order to enable them to incur the heavy expenditure involved in higher or professional education in England after having already undergone the expense of University education in India, are, I venture to think, likely to do credit to their training and position during the years of their residence in England unlike some of the ill-educated youths who used to proceed to England in the days before the new rules for admission were introduced. The three main grounds put forward by Dr. Arnold for the creation of what he calls an "Independent Indian Bar" have, therefore, entirely disappeared. Speaking for myself, I am, like Sir Lawrence Jenkins, "convinced by an experience extending over many years that the professional standard of advocacy in India is distinctly improved by residence in England and in saying this I have in mind concrete instances which support my view." And, like him, I hold that "it must not be assumed that the proposed scheme would raise the standard of professional skill or morals in India". Personally, I have no doubt whatever that any proposal now put forward calculated to shut Indian young men out from qualifying themselves at the Inns of Court in London for membership of the English Bar by the creation of an exclusively Indian Bar in this country is no longer

justifiable on any hypothesis whatever and will, I feel sure, be resented by at least a considerable section of the educated Indian public.

The case of self-governing Colonies, to which reference has been made in my Hon'ble Colleague's note stands on an entirely different footing. They have reached the full Dominion status and, in consequence, are in a position to act on the principle of self-determination. The connection between England and the self-governing Dominions stands on an entirely different footing from that subsisting between England and India. To my mind, the opportunities at present existing in India and England for Indian young men, on the one hand, to proceed to England to complete their education and to qualify themselves for the legal and other professions and, on the other hand, for the British members of the English Bar to come out to India in order to launch upon a professional career in this country, are conducive to the mutual advantage of the two countries. I am convinced that had proper advantage been taken in this country of the facilities which, if I may use the expression, this interchange of intellectual agencies provides for the promotion of Indo-British co-operation, the political conditions in India would not have reached the existing acute stage. When India has attained Dominion status and is in a position to decide her own future destiny, there will be time enough for the rulers of that period to decide upon whatever course of action they think fit in connection with this problem.

2. Closely examined, the movement for the creation of an Independent Indian Bar which is supposed to exist in certain sections of the legal profession in this country will be found, in reality, something quite different in its nature from what the advocates of such a creation suppose it to be. I have personally discussed this question with some of the leading Vakils in the Legislative Assembly, including some of the authors of the various Bills and Resolutions which have been put forward in connection with this controversy. What the Vakil section of the Indian Bar really seek to remove are the distinctions which at present obtain in this country between the status and privileges enjoyed by Barristers and Vakils respectively. The right of preaudience at present enjoyed by Barristers irrespective of seniority, the exclusion of Vakils from the Original Side of the Calcutta High Court and the disabilities which they suffer in the matter of appointments to the highest judicial and executive posts, are really at the bottom of this agitation. This is the real reason for the various Bills and Resolutions which have been put forward in order to bring about the removal of these distinctions and disabilities. In the existing state of things in India, members of the legal profession have no share in the disciplinary jurisdiction exercised over the profession by our High Courts and the desire of the profession to have a

voice in what concerns its vital interests is, therefore, perfectly natural. Hence Mr. Rangachariar's Bill in which he seeks to consolidate and amend the law relating to legal practitioners in India and to empower the Government of India and the local Governments to establish General Bar Councils in different provinces. Incidentally, it will be noticed that this Bill is not, strictly speaking, designed to create an Independent Indian Bar in the sense in which the proposal was put forward by Lord Haldane and Sir T. W. Arnold. The real remedy for these legitimate grievances lies in their removal by the various Indian High Courts. It is, to my mind, absolutely inexpedient as well as entirely undesirable to bring the Government of India or the Provincial Governments, by means of statutory enactments, into this matter. Such a course is not only calculated to impair the prestige and powers at present enjoyed by our High Courts but is also sure to introduce complications and difficulties in our administrative machinery. To my mind, the attention of our Indian High Courts should be invited to the desirability of framing rules calculated to remove the grievances mentioned above which lie at the root of the dissatisfaction which at present exists among the Vakil section of the Indian Bar. In this connection, it will, perhaps, be interesting to my Hon'ble Colleagues to know that a Bar Council has been in existence for many years at Lahore. It consists of 5 members, one of whom is the President of the Lahore High Court Bar Association, who is *ex-officio* President of the Council ; two of its members are nominated by the Judges of the High Court, and two are elected annually by the High Court Bar Association. I myself was a member of this Council for a number of years and for over two years was its President *ex-officio* in my capacity as President of the High Court Bar Association. All cases of disciplinary action against members of the Punjab Bar, whether Barristers or Vakils, initiated on complaints of litigants or otherwise, are referred by the Judges to this Council and final action is taken upon its recommendations. The Council has power to examine witnesses in connection with any inquiries that it may consider necessary to hold upon complaints made against individual practitioners with regard to their professional misconduct in any case. The institution of such Bar Councils in other High Courts would go a long way to satisfy professional sentiment. These Councils can be instituted in the various provincial head-quarters by the High Courts themselves without resort to statutory enactment. To my mind, these are the lines on which action should be taken in order to remove the grievances which at present exist in a section of the legal profession in this country and to satisfy the claims of the profession for a legitimate share in the administration of professional affairs and in promoting the dignity and honour of the profession itself.

No. 18.

(I—III.)

LEGALITY OF THE GUARANTEE GIVEN BY GOVERNMENT TO THE IMPERIAL BANK OF INDIA IN THE MATTER OF THE ALLIANCE BANK LIQUIDATION.

I.

(*5th July, 1923.*)

ON the 27th of April last, the Finance Department, acting on behalf of the Government of India, authorized the Imperial Bank " to repay forthwith 50 per cent. of the amount standing at the credit of depositors in the Alliance Bank of Simla, including current account and Savings Bank balances, in the event of liquidation of the said Bank ". And according to the letter of authority signed by Mr. McWatters, the Government of India guaranteed " to make good to the Imperial Bank of India any loss incurred by the Bank in making such payments ".

2. According to the Finance Department's note, the guarantee in question was given in order—

(*a*) to prevent financial panic ;

(*b*) to minimize hardship to depositors and creditors of the Alliance Bank ; and

(*c*) to assist Government's own credit, since large borrowing operations were pending both in England and in India.

Of the three influencing factors which are thus stated to have led the Finance Department to give the guarantee in question, factor (*b*) can be easily disposed of. To my mind, that factor cannot, on any reasonable hypothesis, be considered to fall within the purview of Section 20 (1) of the Government of India Act. The revenues of India, according to that section, " shall be applied *for the purposes of the government of India alone* ". The minimizing of hardship to depositors and creditors of a private Bank cannot, in my opinion, be regarded as falling within the expression " for the purposes of the government of India alone ". The question for opinion then is whether the other two factors mentioned above fall within the language of the Statute.

3. In the case reported in the XXVIII Volume of the Indian Law Reports, Bombay series, at pages 314, etc., the Bombay High Court interpreted the expression " government of India " as " bearing the meaning not of the Governor-General in Council, but (in the phraseology of the older Acts)

of the superintendence, direction and control of the country " (see page 321). It is true that this was a ruling under the old Act. But it is obvious that the language of the old Act having been reproduced in Section 20 of the Government of India Act, 1919, the interpretation placed on this particular expression in the judgment of the Bombay High Court cannot be altogether ignored. Since the passing of the new Act, however, a very interesting judgment has been delivered by Mr. Justice Coutts-Trotter of the Madras High Court in which there is an interesting discussion regarding the exact signification of the expression " government of India ". That ruling is reported in Indian Law Reports, 45 Madras page 156. In that case, the Government of Madras were carrying on the Kerala Soap Institute at Calicut for demonstration purposes and had supplied soap to the insolvents Subramania Chitty & Co. The Government, as creditors of the insolvents, claimed priority over other creditors and the question for decision before the High Court was whether that claim was valid. The Madras Government claimed priority on the ground that where the Crown comes into competition with other creditors in the case of debts of the same degree, the rights of the Crown must prevail. For the respondents it was contended that the Government of India had no right to trade except for the purposes of government and that the revenue derived from the factory was not " applied for the purposes of government " within the meaning of Section 20 (1) of the Government of India Act. At page 164, Justice Coutts-Trotter, after reproducing the words of Section 20 (1) of the Government of India Act, 1919, went on to observe as follows :—

> " Exactly to draw the line as to what falls within the strict purview of the phrase the ' government ' of the country and what lies outside it, would be an impossible task. To take an example ready to hand, many, if not most, of the Indian railways are conducted or subsidised by Government without specific statutory authority ; it would be startling to have to come to the conclusion that such an activity of Government was without warrant. Mr. Mockett shrank from pressing such a result and argued that although no doubt railways brought in much profit from the carriage of private passengers and goods of private owners, yet their maintenance was essential to the Government by their facilities for rapid transport of Government officials and the police and military forces necessary to secure law and order throughout the country and that therefore they may be regarded as essential to the ' purposes of ' the government of India ', in the strictest sense. But he maintained that an experiment like the present,

> however benevolent and though wholly desirable for the benefit of the people, cannot be regarded as reasonably appertaining to the 'government' of the country but rather to its improvement and education. I think there is much force in his argument, but with some hesitation I think that in India at all events it ought not to prevail. In a country with a fully developed industrial life like England, I might feel constrained to give effect to it. But in a country like India where many industries suitable to its natural resources and its people have either not been started at all or are nascent and struggling, I think it would be a misfortune if a Judge were driven to say that the starting and encouraging of such industries by way of education and demonstration was not covered by the term the 'government' of India. The government of India after all has long been and must long be a paternal Government, and in deciding what is within its legitimate scope, one can hardly lose sight of that outstanding consideration."

It will thus be seen that the facts in that case were somewhat peculiar and it was with some hesitation that the learned Judge arrived at his conclusion in favour of the view pressed before him by the Advocate General, Madras. To what extent the reasoning adopted by Justice Coutts-Trotter applies to the present case is a matter upon which it is difficult to give a decided opinion, in view of the fact that in the present case the action taken by the Finance Department is entirely different in character, involving not gain but the incurring of liability by Government, and the circumstances of the two cases are not analogous. I am, however, of opinion that the two factors (*a*) and (*c*), mentioned above, which led the Finance Department to take this action, may legitimately be regarded as falling within the expression " for the purposes of the government of India " as used in Section 20 (1) of the Act and that the action of the Government of India was, therefore not *ultra vires*.

4. It is, however, necessary for me to invite attention to Section 21 of the Government of India Act. According to that section " subject to the provisions of this Act and Rules made thereunder, the expenditure of the revenues of India, both in British India and elsewhere, shall be subject to the control of the Secretary of State in Council, and no grant or appropriation of any part of those revenues.....shall be made without the concurrence of a majority of votes at a meeting of the Council of India:

Provided that a grant or appropriation made in accordance with provisions or restrictions prescribed by the Secretary of

State in Council with the concurrence of a majority of votes at a meeting of the Council shall be deemed to be made with the concurrence of a majority of such votes ".

It is for the Finance Department to see whether the necessary requirements laid down in this section were complied with in the present case.

II.

(*13th July 1923.*)

From a perusal of the two Judgments recorded by the learned Chief Justice and Justice Kemp in the Bombay High Court, it is perfectly clear that the decision of the Court on all the points but one, arising out of the pleadings of the parties to the suit, embodies the Judges' *prima facie* view on these points in connection merely with the inter-locutory proceedings actually before the Court. In his Judgment, the learned Chief Justice observed as follows :—" In this appeal, at the outset, we have to remember that this is an inter-locutory proceeding and the materials which would be necessarily available to the Court with reference to the questions raised in the suit at the hearing of the suit are not at present available and in considering the arguments which have been addressed to us on various questions of importance, both of fact and of law, we have to consider them so far as necessary for the purposes of this appeal and only for the purposes of the appeal and whatever I say in the Judgment *I desire to make it clear that I do not desire to express any opinion on any question of fact or of law that may ultimately be decided in the suit. I apply my mind to the consideration of the necessary questions only on the materials available and only so far as it was necessary for this inter-locutory proceeding.*" Similarly, Justice Kemp in his Judgment observed : " I also say that anything that I may say in my Judgment would not prejudice the trial of the case. I also want to point out that as the Government is not a party to these proceedings, anything that may be decided by us cannot possibly be binding on the Government. There may be a question which I need not consider whether the Government should be made party to this suit or not."

2. These observations conclusively establish the position that the decision of the Bombay High Court on the points argued before them is based upon the materials, at the time, available, consisting of affidavits and certain documents alone, merely for purposes of the inter-locutory proceedings relating to the *ad interim* injunction and are not conclusive in so far as the ultimate decision of those points, and of any others that may arise upon the parties' pleadings in the suit itself, is concerned. In other words, even the points actually dealt with by them in

these proceedings are still *sub-judice*. And the opinion now pronounced by the learned Judges must be considered as merely constituting their *prima facie* view of the matters dealt with by them in relation to the continuance or revocation of the *ad interim* injunction against the Imperial Bank issued, in the first instance, by Mr. Justice Kajiji and subsequently set aside by him. It must further be borne in mind that the Government of India have not yet been made party to this suit and it is quite possible that they may hereafter be impleaded in order that the points in dispute may be finally decided as between all the parties concerned in this transaction.

3. Of the several points argued before the Bombay High Court, there were only two in which the Government of India are directly concerned :—

(*a*) Whether the transaction in question amounted to an advance by the Imperial Bank of India to the Alliance Bank in order to pay off the depositors to the extent of 50 per cent, or whether it was a loan by the Imperial Bank to the Government of India and they were really acting merely as bankers to that Government in carrying out the arrangement to pay 50 per cent. of the claim of the creditors of the Alliance Bank of Simla ?
(*b*) Whether the action of the Government of India as disclosed by the letter of guarantee was *ultra vires*.

On the first question, the learned Judges, on the basis of the affidavits and the document before them, came to the conclusion that " it seems *prima facie* that the Imperial Bank of India were not making any independent loans or advances on their account to the Alliance Bank of Simla or to its creditors but acting under the instructions of the Government of India." To quote the words of the learned Chief Justice :—" It is quite true that if the word " guarantee " has been properly used, it will indicate a third party and the Government of India as guarantor, but I am unable to think that in these two letters the word " guarantee " was used in that sense because the whole tenor of these two letters seems to me to indicate that the Imperial Bank of India were asked by the Government of India to undertake the payment to the creditors of the Alliance Bank of Simla to the extent of 50 per cent., and taking these letters along with the affidavit of the defendant No. 2 and the Resolution, it is difficult to resist the inference which is suggested on behalf of the defendants in the course of the arguments urged by the Advocate-General that this was substantially a loan by the Imperial Bank of India to the Government of India and they were really acting as bankers for the Government of India and are making these payments as desired by the Government of India. " With all due deference to the learned Judges of the Bombay High Court, I have, in my own mind, grave doubts as to the correctness of this opinion.

4. The case for the Imperial Bank, as stated in the judgment of Mr. Justice Kajiji, was that "on the 27th of April 1923 there was an interview between Mr. McWatters, Secretary to the Government of India in the Finance Department and Sir Bernard Hunter and Sir Robert Aitken, two of the Governors of the Imperial Bank. At that interview, Mr. McWatters requested the Imperial Bank to advance 50 per cent. of the claims of the creditors and depositors of the Alliance Bank of Simla, if it was possible to arrange to have the liquidation of the Alliance Bank of Simla under the supervision of the Imperial Bank and *asked them that they should recover from the dividends payable by the liquidators of the Alliance Bank the amount of such advance : and if there was any deficit the Government of India would make good the same.* It was stated in the affidavit of Sir Robert Aitken that he placed this proposal before the Committee of the Central Board and the Committee thought fit to advance the money and accepted the proposals and passed the necessary resolution." To this statement of facts, as given in the judgment of Mr. Justice Kajiji, it must be added that the Directors of the Alliance Bank agreed to the liquidation proceedings being under the supervision of the Imperial Bank in the event of the latter agreeing to pay 50 per cent. of the deposits as mentioned above. It appears that the deposits in question amounted in all to 8½ crores and, in consequence, under this arrangement, the Imperial Bank were to pay a sum of 4¼ crores to the depositors of the Alliance Bank which they were, in the first instance, to recover from the liquidators of the Alliance Bank. Under the guarantee given by the Government of India they were to make good any loss which may accrue to the Imperial Bank in making such payments. It is obvious that should the assets of the Alliance Bank realised by the liquidators amount to more than 4¼ crores, no liability whatever would fall upon the Government of India under the arrangement entered into between the parties and, in any case, the Government of India would be called upon to fulfil the conditions of the guarantee given by them only up to the amount of the loss which the Imperial Bank might incur in paying the amount agreed upon. In order to insure the payment by the liquidators of dividends up to that amount to the Imperial Bank, the liquidation proceedings were to be held under the supervision of the latter. It will be seen, therefore, that what the Government of India incurred under this arrangement was a contingent liability. In other words the Government guaranteed to the Imperial Bank payment of any loss that they might incur in the carrying out of this arrangement. It is quite true that it was at the instance of the Government of India and upon the guarantee aforesaid furnished by them that the Imperial Bank agreed to pay the money provided the liquidation was held under its supervision. But that fact does not change the position of the Government of India from that of a

guarantor to one of a debtor to whom a loan is advanced by the creditor. The depositors to whom 50 per cent. of their deposits were to be repaid by the Imperial Bank had deposited their money with the Alliance Bank and not with the Government of India. It follows therefore that these repayments of deposits were to be made by the Imperial Bank on behalf of the Alliance Bank. In these circumstances, I have myself grave doubts in the correctness of the opinion expressed by the learned Judges of the Bombay High Court that the transaction in question must be treated as a loan by the Imperial Bank to the Government of India establishing the relationship of creditor and debtor between the parties. It must be remembered that, as I have observed above, this decision of the Bombay High Court is not final and the point is in reality still *sub judice*. The Bombay High Court have intentionally refrained from deciding, at this stage, the question raised before them regarding the power of the Government of India to enter into this transaction under Section 20 (1) of the Government of India Act. This question also is still *sub judice* and will be decided in the regular suit. I have already, in my note of the 5th instant, expressed my own view with regard to this question, holding that the Government of India's action was *intra vires*. But in view of the fact that the Bombay High Court have not yet decided this question and the matter might go up to Their Lordships of the Privy Council, we have to examine what the position will be should the decision of the Courts be to the contrary. In case the liquidation proceedings result in 50 per cent. of the deposits in the Alliance Bank being recovered out of its assets, it is obvious that there would be no occasion for the Imperial Bank to call upon the Government of India to fulfil the guarantee given by them. In that event, no question of law would arise upon which it is necessary to give an opinion. On the other hand, the question arises what will be the position of the Government of India and of the Imperial Bank in case the latter is now directed to complete payment of 50 per cent. of the deposits in the Alliance Bank to those persons who have made such deposits, without waiting for the final decision of the suit now pending in the Bombay High Court. It is clear that should the Court hold that the action of the Government in entering into this transaction was *ultra vires* as contrary to Section 20 (1) of the Government of India Act, the contract entered into between them and the Imperial Bank would be absolutely void. No authority is needed for the proposition that contracts entered into by a party contrary to express statutory provisions are void. Nor could the Imperial Bank plead estoppel against the Government of India in a case like this. In para. 537 page 379, Vol. XIII, of Halsbury's Laws of England, the legal position is stated as follows :—

"A party cannot by representation any more than by other means raise against himself an estoppel so as to create a

state of things which he is under a legal disability from creating. Thus a corporate body cannot be estopped from denying that they have entered into a contract which it was *ultra vires* for them to make. No corporate body can be bound by estoppel to do something beyond its powers, or to refrain from doing what is its duty to do and the same principle applies to individuals. No person can by his conduct or otherwise waive or renounce a right to perform a public duty, or estop himself from insisting that it is right to do so."

Lord Justice Bowen in the British Mutual Banking Co. Ltd., *vs.* the Charnwood Forest Ry. Co., (Law Reports, Vol. XVIII, Q.B.D., 714, at page 718) laid down the rule in these words : " It is said that the Secretary was clothed ostensibly with a real or apparent authority to make representation as to the genuineness of the debentures in question ; but no action of contract lies for a false representation unless the maker of it or his principal has either contracted that the representation is true, or is estopped from denying that he has done so. In the present case defendant Company could not in law have so contracted, for any such contract would have been beyond their corporate powers. And if they cannot contract, how can they be estopped from denying that they have done so." Nor can the doctrine of estoppel be applied to an Act of Parliament. In *re.* Stapleford Colliery Co., (XIV Law Reports, C. D., 432, at page 441) Bacon, V. C., laid down this principle in the following words :—" The doctrine of estoppel cannot be applied to an Act of Parliament. Estoppel only applies to a contract *inter partes* and it is not competent to parties to a contract to estop themselves or anybody else in the face of an Act of Parliament. It cannot be doubted that the Statute covers this contract : not can it be argued that it is possible for directors, by issuing fully paid-up shares which get into the hands of holders for value without notice, to avoid the requirements of the Statute The Act of Parliament was designed for the protection of creditors ; it was consideration for the rights of creditors which caused the enactment to be made ; it is the creditors whose rights will be sacrificed if the Act can be violated with impunity. I am of opinion that, as between the parties to this contract, there was no estoppel ; they contracted to do a thing which in the result it was unlawful to do, and which could only have been made lawful by registration." Substituting the word " tax-payers " for " creditors " in this quotation from the Judgment of Bacon, V. C., the pronouncement made by him completely fits in with the present case. In the Madras Hindu Mutual Benefit Permanent Fund, *vs.* Ragava Chetty and other, (I.L.R., XIX Madras, 200) there is a very interesting discussion of the same principle at pages 207-8 of the Judgment, where a number of authorities are cited in support of the same proposition.

It is unnecessary to multiply authorities in support of a rule of law which has always been recognised as beyond question. And in this respect the original guarantee given by the Government of India as well as the subsequent pledge of a portion of the balances in deposit with the Imperial Bank as security for the due fulfilment of such guarantee stand on the same footing. If the Government of India had no power to enter into this transaction and, in consequence, the guarantee is *ultra vires* of the Government of India Act, it necessarily follows that the pledge of their balance in deposit with the Imperial Bank for the fulfilment of this illegal contract is itself *ultra vires* and that contract too is, therefore, null and void. Whether the Government of India be either a plaintiff or a defendant in a subsequent suit between themselves and the Imperial Bank is entirely immaterial ; the position in either case would be identical. The Imperial Bank could not, in the face of the express provision in the Act of Parliament enforce either of the two contracts against the Government of India.

5. Should the Government of India, in spite of the position as described above, decide upon directing the Imperial Bank to continue making payments to the depositors up to 50 per cent. of their deposits as previously arranged, it is further clear that in case an occasion arises for them to fulfil the terms of their guarantee as an obligation of honour, they would have to go to the Legislative Assembly. On the assumption that the action of the Government of India is *ultra vires*, it is obvious that the Legislative Assembly would not sanction such payment. The transaction itself, on that assumption, being contrary to the provisions of the Government of India Act, it seems to me that the Governor General in Council could not exercise his powers vested in him under Section 67 (*a*) (7) of the Government of India Act. The only remedy, as has been rightly observed by Mr. Graham, would be by a Validating Act of Parliament.

III.

(13th July, 1923.)

The note above embodies my view in regard to all the points on which, I understand, my opinion was called for by His Excellency. According to a statement of the legal issues involved, furnished by Mr. McWatters to Mr. Graham, there is a further question on which he would like to have my opinion, *i.e.*, whether the Imperial Bank's action was *intra vires* of the Imperial Bank Act. I fail to see how, as Law Member, I have anything to do with this issue. That is a point with reference to which the Imperial Bank ought to obtain the opinion of their own Counsel.

No. 19.

GOVERNMENT RIGHTS TO THE USE OF THE WATER OF THE RUPNAGAR RIVER (RELATIONS WITH KISHENGARH STATE).

(7th July, 1923.)

Foreign and Political Department File No. 1301-Internal.
(Legislative Department unofficial No. 554 of 1923.)

IN his note dated the 21st ultimo, my Hon'ble Colleague Sir Basil Blackett observed as follows :—

> " Without entering into the legal discussion of the relationship between an Indian State and the Government of India, it seems to me that the practical conclusion from the existing condition of those relations is that the Government of India and the Kishengarh State may be treated as being in exactly the same relationship as a private individual using the lower waters of a stream which passes through the land of another private individual living higher up the stream."

Looking at the case from this point of view, my Hon'ble Colleague asks :—

> " Would not the only question which would arise be, whether the individual living lower down the stream was entitled to prevent the individual higher up from taking action prejudicial to his existing interests, or to claim compensation if he took such action ? "

These observations, I am afraid, are based upon a misapprehension of the essential facts existing in this case. The relative position occupied by higher and lower riparian owners presupposes the passage of a stream through the lands belonging to more than one proprietor, each one of whom is entitled, by reason of the fact that the stream passes through his estate, to what Their Lordships of the Privy Council described as " application of the water " within the limits of his own property. Here the case seems to me to be entirely different. In the words of Mr. (now Sir) Henry Dobbs, " The Rupnagar River lies almost entirely in Kishengarh territory, in fact entirely except for its debouche on the Sambhar Lake, where it is shown on the map as passing through a narrow strip of Jodhpore territory. " (See Foreign Dept., Progs. No. 414, May 1908, page 9). It will thus be seen that no portion of this stream passes through British territory. On the other hand, as is noted by Mr. Barnes at page 8 of the proceedings mentioned above, the Treaty of 1818 with Kishengarh contains the definite assurance that the

Maharaja and his heirs shall be absolute rulers of their country. In these circumstances, I fail to see how, strictly speaking, the question of relative rights of higher and lower riparian owners arises at all in the present case. The entire stream passes through practically Kishengarh territory and the interests of the British Government arise only after the stream has merged into the Sambhar Lake and its existence as a stream has come to an end.

But, even if it were to be supposed for a moment that this case, as my Hon'ble Colleague has assumed, can be treated as one of the relative rights of higher and lower riparian owners, the legal position, so far as the rights of Kishengarh State are concerned, cannot on any hypothesis, be considered otherwise than as is described* by Mr. Graham. Agreeing as I do with the conclusion arrived at by him, and the reasons which he has adduced in support of that conclusion, I do not propose to travel over the same ground. If the position taken up by my Hon'ble Colleague were to be accepted as correct, the necessary conclusion would be that a lower riparian owner is entitled to the exclusive use of the whole volume of water in the stream and can prevent the legitimate use by the higher owner of the share of water to which he is, in law and equity, entitled for the purposes of irrigating his estate. The law, as I understand it, entitles the higher owner to withdraw from the stream, as it passes through his lands, for purposes which the law regards as legitimate, so much of its water as will not materially affect the downward flow of the stream itself. The right vested in the lower riparian owner to prevent the proprietor of an estate higher up the stream from over-exercise of his right beyond what is mentioned above, rests upon the principle that the former is, in his own turn, entitled to make use of the water of the stream for purposes which the law recognises as legitimate connected with his own estate. The rights possessed by the two riparian owners in the use of the water of the stream are, in their essence, of an analogous character ; and, so far as the right of each to a reasonable share of the water for purposes regarded by law as legitimate and, as a result, the consequential right to prevent interference in the use of that share, are concerned, these arise from the fact that the stream passes through the estates of both. The right claimed by the rulers of Kishengarh to make use of the Rupnagar River water passing through their territory for purposes of irrigation is a perfectly legitimate right. On the other hand, the claim by the British Government to have the entire volume of water in the river flowing

*The storing of water by Kishengarh State for irrigation in reasonable quantities is a riparian right but the reception of water into a lake for the purpose of making salt cannot be claimed as a riparian right.

intact into the Sambhar Lake, in order to enable them to manufacture a larger quantity of salt than would be the case if the rulers of Kishengarh were to exercise their legal right, is not only one which, to my mind, cannot be regarded strictly as the right of a lower riparian owner, but also is, in the form in which it is put forward, a right which I doubt if any Court of Law would be prepared to recognise. Should the Government of India go to Court over this matter, the suit would assume the form of one for specific relief by way of injunction and it is obvious that the burden of proof would rest on our shoulders to establish our claim. Moreover, it is a well-recognised principle of law that he who seeks equity must do equity. For our own benefit, in order to secure enhanced salt revenue, we seek to deprive the Kishengarh State from exercising its right of irrigating State lands from the river which passes through its territory and thus to cause it loss. In these circumstances, to me it is obvious that if we, by reason of our position as Paramount Power, prohibit the Durbar either from maintaining its old works or from constructing new ones, the latter is equitably entitled to compensation from us.

No. 20.

APPOINTMENT OF A REGISTRAR OF A HIGH COURT FROM OUTSIDE THE INDIAN CIVIL SERVICE.

(2nd August, 1923.)

I AGREE. Clause 8 of the Bombay Letters Patent is perfectly clear and unambiguous. The appointments therein mentioned are to be made by the Chief Justice " subject to any rules and restrictions which may be prescribed *by the Governor in Council* ". It is unquestionable, therefore, that the Governor in Council has, under that clause, power to prescribe rules and restrictions regarding ministerial appointments in the High Court, including that of the Registrar. The mention of ' the Government of India ' in the Order in Council issued as a result of the opinion recorded by Their Lordships of the Privy Council on Sir Basil Scott's petition to His Majesty is an obvious mistake and steps should be taken to regularise the position in the manner suggested by Mr. Graham.

(Legislative Department unofficial No. 658 of 1923.)

2. While the legal position is as mentioned above, personally I have never been able to understand why the post of Registrar in a High Court should be reserved by rule for members of the I.C.S. alone. There seems to be no *a priori* ground for such reservation. On the contrary, considering the nature of the duties performed by a Registrar in a High Court, there is every reason for leaving it open to the Chief Justice to make his selection from the I.C.S., the Bar and the Provincial Civil Service as he may think fit. Such reservation would, moreover, as is pointed out by Mr. Stuart in the Home Department notes, be contrary to the practice which now obtains regarding the listing of posts in the Province.

No. 21.

LEASE OF OILFIELDS IN BURMA. (CONSTITUTIONAL POSITION BETWEEN THE GOVERNMENT OF INDIA AND A PROVINCIAL GOVERNMENT IN REGARD TO PROVINCIAL RESERVED SUBJECTS.)

(6th August, 1923.)

(Legislative Department unofficial No. 658-A. of 1923).

THE constitutional position as between the Government of India and a Provincial Government with regard to provincial reserved subjects is correctly described by Mr. Graham in his note. It is beyond question that the Governor General in Council has, under section 45 of the Government of India Act, the right of superintendence, direction and control over a Local Government in respect of its proceedings under the mining rules now under consideration. I should, however, like to add that, in my judgment, this power of superintendence, direction and control is not, in its nature, arbitrary and must be exercised on sound principles. It is, to my mind, somewhat analogous in character to the revisional jurisdiction of the High Courts over Courts subordinate to them. The Government of India would be perfectly justified in interfering where a Provincial Government exercised, in regard to a provincial reserved subject, power not vested in it under the Government of India Act and the Rules framed thereunder or committed a material irregularity in the exercise of power vested in it by law. The real question, therefore, in the present case is whether the Local Government has acted *ultra vires* or its action is so irregular as to justify interference by the Government of India. Mr. Graham, not having touched on this real point in issue, I have further discussed the question with him and the conclusions embodied in this note are the result of that discussion.

2. A great deal of stress has been laid in the notes recorded in the Administrative Department as well as in Mr. Wright's note on the principle of priority as embodied in Rules 23 and 24 of the Mining Rules and the opinion has been expressed that as between a previous application for grant of a prospecting license and a subsequent application for a mining lease, the former must have priority. With that proposition, I regret, I am entirely unable to agree, Rule 24, laying down that " In the case of two or more applications affecting the same land, the prior right to a license shall, subject to any order to the contrary which the Local Government may in its discretion pass in any particular case, be deemed to lie with the applicant; who being the holder of a valid certificate of approval and after compliance with the procedure prescribed by the rules, shall have been the first to file his application with the Collector ",

occurs in Part II of the Mining Rules dealing with prospecting licenses and *obviously provides for priority as between two or more applicants for prospecting licenses.* Even in this case the rule is " subject to any order to the contrary which the Local Government may in its discretion pass in any particular case ". The reasons for this proviso are obvious. It may be that the Local Government may not see fit to grant any prospecting license with regard to a particular area at all and may prefer to grant a lease of it under Part III of the Mining Rules. It may also be that the first applicant may be a mere speculator or a man of straw having no *bonâ fide* intention of prospecting himself, and the subsequent applicant may be an individual or a company of sound financial standing and of previous experience in mining and the Local Government may very naturally desire to give the license to the latter in preference to the former. Indeed, when we turn to Rule 21 of the Mining Rules, we find it laid down that even the Collector is authorised to refuse grant of a prospecting license on the ground of inexpediency. Similarly, this principle of priority is embodied in Rule 42 with regard to two or more applicants for grant of a mining lease affecting the same land. That Rule occurs in Part III of the Mining Rules which contains provisions regarding the applications for grant of mining leases and even in that Rule the principle of priority of a previous application over a subsequent one is made " subject to any order which the Local Government may pass in any particular case ". It follows, therefore, that the rule of priority between applications for prospecting licenses *inter se* as well as between two or more applications for mining leases is not an invariable rule. To hold otherwise would not only be contrary to the letter as well as the spirit of the rules but would necessarily compel a Local Government to grant a license or a lease to the applicant who is first in the field irrespective of considerations, such as the financial standing of the applicant, the probability of his working the mines in the best interests both of the property and of the public, etc. But apart from the position with regard to two or more applications either for prospecting licenses or for mining leases *inter se*, not only do the rules not provide for any priority where an application for a prospecting license comes into competition with one for a mining lease, but, it seems to me to be perfectly clear that the application of the rule of priority in such a case would be entirely out of place. The reason is obvious. Applied to such a case as this, the rule would lead to this absurdity that even where, in the circumstances of a particular case, the Local Government preferred to grant a particular piece of land on a mining lease and was unwilling to grant a prospecting license with reference to it, it could not do so and would be compelled to grant the prospecting license applied for. Indeed, the question of priority can arise only between applications of similar nature and not where they are

intended for grants of an entirely different character and are preferred under entirely separate Parts of the Mining Rules.

From what has been said above, it is clear that the passage marked A by me in paragraph 2 of the "draft for approval" embodies an entirely incorrect exposition in so far as the legal aspect of the case is concerned. Indeed, the subsequent passage in the same paragraph, marked B by me, to which no exception can be taken on a correct interpretation of the rule in question, is contradictory of what has been said at A. It may, however, be added that the one illustration, mentioned in this passage of what the Committee had in mind when they introduced the words "subject to any order which the Local Government may pass in any particular case" into this Rule cannot be treated as exhaustive. There may be other cases, some of which have been mentioned by me in the preceding paragraph, in which the Local Government may be perfectly justified in giving preference to a subsequent applicant over one who, in point of time, has preferred his application before the other.

3. I turn now to the Notification issued by the Local Government in the Burma Gazette of 31st October 1922, which has been cited in full in the Memorandum of Objections submitted by the Burma Oil Company, Limited, to the Government of India. In his note, Mr. Wright considers the Notification issued by the Burma Government *ultra vires* on the ground, among others, that under Rule 34 of Part III of the Mining Rules, applications for grant of mining leases should be presented to the Collector and, in consequence, the Notification asking for applications to be submitted to the Revenue Secretary to the Government of Burma direct is *ultra vires*. Here, I regret I am unable to agree. From a perusal of Rule 34, it will be seen that the Collector merely acts as a post office in this case. He is, by that very Rule, required to forward the application through the proper channel to the Local Government. It is clear, therefore, that the irregularity in the Notification in this respect is not at all material and does not, in any way, affect the real merits involved in such a case.

4. The real substance of the Notification, however, stands on an entirely different footing. What the Local Government has done is to publish a Notification in the official Gazette calling for applications for a fresh lease over the Block in question, *having decided that the lease shall be granted to the applicant who offers such terms as to royalty and premium as are most acceptable to the Government.* In other words, what the Local Government contemplates is that the applications shall contain offers of terms as to royalty and premium in order to enable it to select the applicant whose offer with regard to the two matters mentioned in the Notification is most acceptable to Government.

5. Now, according to Rule 1 of the Mining Rules, "No license to prospect for minerals or lease of mines and minerals *shall be granted by any Local Government otherwise than in accordance with these rules,* except with the previous sanction of the Secretary of State for India in Council, or with that of the Governor General in Council under any general or special authority which he may have received in this behalf from the Secretary of State in Council." It is clear, therefore, that any lease granted by a Local Government otherwise than in accordance with the Mining Rules would be illegal and the action of the Local Government in granting such lease would be *ultra vires.* The rules in question do not anywhere provide for payment of a premium by the lessee as part of the consideration for grant of a mining lease Rule 36 providing merely for the deposit by the applicant along with his application of a sum not exceeding Rs. 500 as security in respect of preliminary expenses. According to Rule 50, every mining lease shall contain, among others, a condition that "The lessee shall pay a royalty or royalties at the rate specified in the lease, which *rate or rates shall be those fixed for the particular mineral or minerals in Schedule A in Part IV of these rules*". According to Schedule A, Part IV, attached to the Rules, a royalty on oils is fixed at 8 annas per 40 gallons or 5 per cent. *ad valorem* on gross value. In these circumstances, it is perfectly clear that, the amounts of royalty payable being definitely fixed in the Mining Rules, there is no room for selection, by the Local Government, from among various offers regarding terms as to royalty, one which it may consider most acceptable. It is for this very reason, I presume, that under Rule 38 of the Mining Rules it is required that every application for a mining lease *shall* contain certain specified particulars which do not include the amount of royalty offered by the applicant. In these circumstances, it is perfectly obvious that the notification in question issued by the Local Government calling for offers of premium and royalty of which it is intended to select the one that may, in respect of these two matters, be most acceptable to the Local Government, is *ultra vires* of the Mining Rules and, therefore, it becomes the duty of the Government of India to exercise the powers vested in them under Section 45 of the Government of India Act by pointing out to the Local Government the illegality of their action.

6. In addressing the Local Government in this connection, it is necessary to bear in mind the fact that, whatever may have been the position when the Mining Rules, now in operation, were framed, at the present day Burma is a Governor's Province and the Government of India Act, 1919, is now in operation in that Province. It is, therefore, in the new conditions now in existence, necessary to avoid arguments which can either be completely met or are even debatable, particularly when we can advance an absolutely clear and conclusive ground justify-

ing interference by the Government of India in the exercise of their powers of superintendence, direction and control. The letter to be addressed to the Local Government, therefore, should confine itself to the one ground upon which our position is entirely unassailable.

7. While I have, in the preceding portion of this note, discussed the legal position and pointed out what, in my judgment, is the right course to be adopted in this case, I desire to invite the attention of the Administrative Department to an unsatisfactory feature of the position as it stands at present. The existing Mining Rules were framed as far back as the year 1913. Since that date, the Government of India Act of 1919, has come into force. Whatever may have been the position of the Local Governments in 1913 in regard to the subject matter with which we have to deal in this case, their position has now undergone a substantial change. Mineralogy is now a provincial subject, *albeit* reserved, and the revenues derived from this source are exclusively provincial. The Mining Rules lay down, absolutely rigidly, provisions regarding the amount of royalty payable and other matters and leave no latitude whatever to the Local Governments to exercise their own judgment with regard thereto. The Local Governments are thus debarred from adopting any measures, however justifiable by the circumstances of a particular case, from taking any steps calculated to enhance their revenue from this particular source. This state of things seems to me to be inconsistent with the constitutional position as it now exists under the Montford Reforms. It is quite true that Local Governments cannot be allowed to play ducks and drakes with sound commercial and financial principles which ought to regulate prospecting licenses and mining leases. But that is an object which can be secured by framing rules on lines other than those upon which the existing Mining Rules were framed in 1913 and does not necessitate absolute rigidity of the kind which is a prominent feature of the rules under discussion. To me more than one of the existing Mining Rules seem to be open to this objection and I would, therefore, invite the attention of the Administrative Department to the desirability of considering the question of undertaking a revision of these rules.

No. 22.

PROPOSED INDIA AND BURMA MILITARY AND MARINE RELIEF FUND.

(15th August, 1923.)

I have read the statement of the case drafted by Mr. Burdon, and the appeal issued by Lord Hardinge on behalf of the Imperial Indian Relief Fund and after a careful consideration of the objects for which the various funds, which are now sought to be consolidated in the proposed India and Burma Military and Marine Relief Fund, were raised, I am of opinion that the assets of the proposed fund cannot legitimately be devoted to the second object mentioned in paragraph 3 of the statement referred to me for opinion.

2. The fund known as the Patriotic Fund was raised for the relief of sufferers in the Afghan War, 1879-80. In 1885 the Central Committee of that Fund closed its accounts and made over the unexpended balance in trust to the Government of India. This balance was invested by the Government of India in Government securities to form the nucleus of a similar fund to be distributed among the sufferers in any future war in which the Indian Army might be employed. In 1898 a fund known as the "Indian Heroes Fund" was raised in England for the benefit of Indian soldiers disabled and of the families of those killed in military operations on the North-West Frontier Province. These two funds were subsequently amalgamated, the combined fund being designated the "Patriotic and Indian Heroes Fund." It will be seen from what Lieutenant-Colonel Moore has said that the combined fund was brought into operation on three occasions, two of which were connected with the North-West Frontier operations and the third with the Great War of 1914-18, being a contribution towards the Imperial Indian Relief Fund raised as the result of the appeal issued by Lord Hardinge on that occasion. The residue, amounting to £28,000, of the Burma War Fund, which will form a portion of the proposed India and Burma Military and Marine Relief Fund, was also raised during the Great War as part of the Imperial Indian Relief Fund in response to that appeal. And when we turn to the appeal issued by Lord Hardinge in connection with the formation of an Imperial Indian Relief Fund, we find that the fund in question *was raised to alleviate distress of all kinds due to the Great War.* The relevant portion of the appeal issued on that occasion runs as follows :—"There will be distress among the families of those who are going from India to the war, and unhappily there may be destitute widows and orphans as a result of the war. . . . . I appeal with con-

fidence to the Ruling Chiefs, nobles, merchants and people of India, both European and Indian, to come forward, each according to their means, and to help to alleviate distress of all kinds due to the war, and especially the distress and suffering that war must necessarily entail upon the families and dependents of those who will be braving death and enduring hardships for the safety and common interests of the Empire. "

3. From what has been said above regarding the origin of the funds which it is now proposed to amalgamate into the contemplated India and Burma Military and Marine Relief Fund, it is perfectly clear that the object with which these funds were raised was to alleviate sufferings resulting from military operations in connection with the various wars mentioned above. The Government of India have already decided, " on the basis of legal advice and due regard being had to the purposes for which both elements in the proposed new fund were originally contributed," that it is permissible to apply the fund for the relief of cases of hardship among the combatant ranks and non-combatant personnel of the Army in India and of the Royal Indian Marine, who had been disabled, and the dependents of the same categories who have lost their lives, as a result of the Great War or as the result in future of overseas service, frontier service or other active service operations in India. That, to my mind, may be regarded as a legitimate extension of the purposes for which these funds were originally raised and, in consequence, there would be no legal or equitable objection to spending the income derived from the capital constituted by the funds in question for that purpose. But it seems to me that it would be an unwarrantable deviation from the purposes for which the funds were originally raised to utilise any portion of the income thereof for the relief of hardship arising from disablement or death, incurred by combatants or non-combatants of the Army in India or personnel of the Royal Indian Marine, under normal peace conditions. Funds raised for the purpose of alleviating suffering due to war cannot, to my mind, be legitimately utilised for relief of hardship arising from disablement or death in normal peace conditions. These funds are in the hands of the Government of India as trusts for specific purposes, and though it may be that the expenditure of any portion of those funds upon purposes in their nature essentially identical with those for which they were actually raised may be neither illegal nor inequitable, their expenditure on a purpose, however justifiable from a philanthropic or charitable point of view, entirely different from those for which the funds were raised, would not be justified by law and would, to my mind, be contrary to well recognised principles of trust.

4. In this connection it is necessary to recall what occurred in the Legislative Assembly in connection with the Indian War Relief Trust Bill which my Hon'ble Colleague Sir Malcolm Hailey, sought to introduce on 5th September 1921. It will

be remembered that the proposed Indian War Relief Trust was to consist of the surplus of 25 lakhs out of the Imperial Indian Relief Fund raised in connection with the Great War and the Patriotic and Indian Heroes Fund. It was proposed to devote the proposed Indian War Relief Trust " in order to afford relief not only to persons who are in distress arising out of the Great War itself, but also for the relief of cases of distress arising out of subsequent military operations." It was further proposed that out of the capital of 25 lakhs mentioned above, a sum of Rs. 11 lakhs should be spent in educational projects connected with the Army. Into the details of these educational projects it is not necessary to enter in this note. In opposing the introduction of that Bill, Mr. E. L. Price strongly objected to the diversion of trust funds raised for particular purposes to objects other than those for which they were raised. In the concluding portion of his speech he asked " the House to refuse on conscientious grounds to permit the diversion of these funds which are intended to relieve the distress of the families and dependents of those who suffered or died in *the* war, the Great War, to an entirely different object which the donors never had in their minds when they subscribed." It is significant to note that the Legislative Assembly refused leave for introduction of that Bill.

5. In this connection it is necessary to point out that after the decision of the Governor General in Council regarding the disposal of the surplus of 25 lakhs out of the Imperial Indian Relief Fund was arrived at on the 3rd December 1920, my Honourable Colleague Sir Malcolm Hailey consulted the Legislative Department as to whether the permanent use of the funds on the lines determined by Council required legislation. He asked for this advice because in the case of Red Cross funds, collected both here and in England, it was decided to legislate in order to cover their use for a purpose not definitely covered by the terms on which the money was collected. From the notes recorded in the Legislative Department in connection with that case, it is clear that there was an absolute unanimity of opinion that the proposed conversion of the fund required legislation. In his note dated the 21st January 1921 Colonel Dunlop was clearly of opinion " that the funds of the Imperial Indian Relief Fund cannot legally be converted to other uses than those for which the fund was instituted," and in his opinion, again, " it is desirable that the proposed conversion of the balance of these funds to other uses should be the subject of legislation on the lines of the Indian Red Cross Society Act." With this opinion my predecessor Sir Tej Bahadur Sapru agreed.

6. It will be seen from what has been said above that the Indian War Relief Trust which was sought to be constituted by Legislation consisted of the remainder of the Patriotic and Indian Heroes Fund and the surplus of 25 lakhs out of the Imperial

Indian Relief Fund. The proposed India and Burma Military and Marine Relief Fund will also consist of the remainder of the Patriotic and Indian Heroes Fund and the residue of the Burma War Fund which was also raised as part of the Imperial Indian Relief Fund. These funds were specifically *raised for purposes of alleviation of suffering resulting from war and* were never intended to be utilised for the relief of hardship arising from disablement or death *incurred under normal peace conditions.* The conversion of these war funds into an ordinary Compassionate Fund to provide for the relief of hardships in normal peace conditions would, to my mind, be entirely illegitimate and would, in any case, require legislation.

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No. 23.

EXTENT AND SCOPE OF THE POWER TO MAKE RULES POSSESSED BY THE GOVERNOR GENERAL IN COUNCIL UNDER SECTION 59 OF THE PRISONS ACT, 1894.

(25th August, 1923.)

(Legislative Department unofficial No. 696 of 1923.)

SECTION 45 of the Prisons Act (IX of 1894), enumerates the various acts which are declared to be prison-offences when committed by a prisoner. According to Section 46, the Superintendent may examine any person touching any such offence, and determine thereupon, and punish such offence, by the various punishments, thirteen in number, which are described in this section. Section 47 empowers him to award any two of the punishments enumerated in Section 46 for any such offence in combination, subject to certain exceptions specified therein. And lastly, according to Section 48, sub-section (1), the Superintendent shall have power to award any of the punishments enumerated in Sections 46 and 47, subject, in the case of separate confinement for a period exceeding one month, to the previous confirmation of the Inspector General. From a perusal of these sections it will be seen that the Act, while empowering the Superintendent to award any of the punishments specified in Section 46 or a combination of two punishments in certain cases, in relation to any of the prison-offences described in Section 46, does not fix any particular punishment, out of the various punishments specified as awardable, with reference to any particular offence. According to Section 59, the Governor General in Council may make rules consistent with this Act, among other things, defining the acts which shall constitute prison-offences and fixing the punishments admissible under this Act which shall be awardable for commission of prison-offences or classes thereof.

2. Bearing these facts in mind, we have now to construe the extent and scope of the rule-making power possessed by the Governor General in Council under Section 59 (3). According to that sub-section, the Governor General in Council may make rules consistent with the Act "fixing the punishments admissible under this Act which shall be awardable for commission of prison-offences or classes thereof." The plain meaning, to my mind, of this enactment is that the Governor General in Council has the power to make rules fixing the punishment awardable under Sections 46 and 47 of the Act for commission of prison-offences or classes thereof specified in Section 45 or for acts which, under Section 59 (1) may, by rule, be defined as acts which shall constitute prison-offences. It seems to me

to be clear, therefore, that there is nothing objectionable in the proposed rules to regulate the punishment of whipping under the Act, for the rules, to quote the language of the sub-section, fix the punishment of whipping in certain specific classes of prison-offences and make that punishment awardable by the Superintendent in the case of those offences.

I am unable to agree that sub-section 59 (3) allows punishments to be fixed only for those acts which may be declared as prison-offences by rules framed under Section 59 (1). The words in sub-section (3) " under this Act " and the general character of the language used, *i.e.*, " awardable for commission of prison-offences or classes thereof " seem to me to make it clear that the Governor General in Council is, under sub-section (3), not limited in his exercise of the power specified therein to the acts which he may define as prison-offences under sub-section (1). Sections 46, 47 and 48 have to be read together with Section 59, and I have no doubt whatever that the restricted view of the scope of Section 59 taken by Mr. Wright in his note is not warranted by a correct interpretation of these sections.

3. As observed by Maxwell in his work on the " Interpretation of Statutes " (see page 54), " It is an elementary rule that construction is to be made of all the parts together, and not of one part only by itself." This well-known principle has been invariably applied by the Courts, both in England and in India, in the construction of apparently conflicting sections of an Act. In Clementson *v.* Mason, (44, L. J., C. P., 171), clause 21 in the Schedule to the Ballot Act, 1872, which in express terms requires the presiding officer at each station to exclude all persons except the clerks, the agents of the candidates and the constables on duty, was found to include also the candidates themselves in the exception, since the subsequent clause (51) provides that a candidate may be present at any place at which his agent may attend. Instances like this could be easily multiplied. Following that principle and reading the various sections of the Prisons Act together, it seems to me that the Governor General in Council has power to frame the rules as proposed in the draft submitted to this Department.

4. Section 59, no doubt, lays down that the rules made thereunder should be consistent with the provisions of the Act itself. That condition is, in my judgment, in no way infringed by the interpretation I have placed above upon the four sections taken together. As has been already observed, Section 45 declares certain acts, when committed by a prisoner, to be prison-offences. Section 46 enumerates the various punishments which may be awarded by the Superintendent in respect of the acts declared to be prison-offences under Section 45. A glance at this section makes it perfectly clear that it does not fix any particular punishment as awardable in respect of a

particular prison-offence. To me it is obvious that the Legislature could not have intended to leave the matter of punishment indeterminate in this manner. For instance, it cannot be supposed for a moment that mere " formal warning " under Section 46 (1) could have been intended as punishment which a Superintendent may award for " conspiring to escape or to assist in escaping " [Section 45 (16)]. Similarly " cellular confinement for any period not exceeding 14 days " [Section 46 (10)], could not have been contemplated as punishment for mere " use of insulting or threatening language " [Section 45 (3)]. Punishment in every case must be appropriate to the gravity of the offence committed and it cannot be supposed that it was intended to leave this matter absolutely to the idiosyncrasies or even to the discretion of a Superintendent without any higher authority, whenever necessary or expedient, having any jurisdiction in relation to so important a question as that of fixation of punishment for prison-offences. Moreover, it was desirable to provide for uniformity in awarding punishments specified in Section 46 for acts declared as prison-offences under Section 45, otherwise the resulting confusion in the various prisons under different Superintendents may present a spectacle in its nature somewhat grotesque. The Governor General in Council or the Local Governments, with his previous sanction, would obviously be the best authority for dealing with this matter in order to secure uniformity as well as to prevent arbitrary infliction of punishments under the Prisons Act. To my mind, it was to secure this highly desirable result that the Legislature vested the authorities mentioned in Section 59, whenever this may be deemed necessary or desirable, with the power of " fixing the punishments admissible under this Act which shall be awardable for commission of prison-offences or classes thereof." It is clear, therefore, that not only are the proposed rules regarding whipping not inconsistent with the Act but they are in conformity with the spirit as well as with the letter of the statute.

And, finally, looking at the matter from another point of view, while Sections 46—48 give the Superintendent discretion to award any of the punishments, or any two combined punishments, for any of the prison-offences enumerated in Section 45, the rule-making power vested in the Governor General in Council under Section 59 (3) enables him to override that discretion by " fixing the punishments admissible under this Act which shall be awardable for commission of prison-offences or classes thereof ".

No. 24.

QUESTION OF THE APPOINTMENT OF GOVERNORS AS AGENTS TO THE GOVERNOR GENERAL FOR THE ADMINISTRATION OF CENTRAL SUBJECTS.

(17th November, 1923.)

Foreign and Political Department File No. 137-Pol. of 1924.

(Legislative Department unofficial No. 438 of 1924.)

WITH all deference to Sir Tej Bahadur Sapru, it seems to me that the position adopted by him in his note of the 7th March 1921 (page 4 of notes in S. I., July 1921, Nos. 24—31), with reference to the question referred to us for reconsideration by the Foreign and Political Department, is untenable. It is, to my mind, perfectly clear that the effect of Rules 3 and 46 of the Devolution Rules, read with clauses (*a*) and (*c*) of the Section 45A (1) of the Government of India Act, is, as Mr. Spence has rightly observed, to require central subjects to be administered either directly by the Governor General in Council or by him through the agency of a Governor in Council. The process of reasoning used by the Bombay Legal Remembrancer in arriving at the same conclusion appears to me to be unquestionably correct. And, speaking for myself, I cannot see how Section 33 of the Government of India Act, read together with the definition of " India " as given in the General Clauses Act, justifies a contrary conclusion.

I am further clearly of opinion that the constitutional objection taken by Mr. Spence in para. 4 of his note to the employment of the Governor personally as Agent to the Governor General in Council for the administration of our relations with Indian States is incontrovertible. The position of an Agent to the Governor General in relation to certain Indian States is, as such, that of a member of the Political Department of the Government of India ; and, as Mr. Graham has correctly observed, a Governor would, in that capacity, be occupying precisely the same position as any other Agent to the Governor General. Such a position is, to my mind, inconsistent with his constitutional status as Governor of a province.

No. 25.

(I—II.)

INTERPRETATION OF ARTICLE VII OF THE ANGLO-AFGHAN TREATY. (IMPOSITION OF A DUTY ON RIVER-BORNE TIMBER LOGS IN THE NORTH-WEST FRONTIER PROVINCE).

I.

(30th November, 1923.)

(Legislative Department unofficial No. 526 of 1924.)

I HAVE carefully weighed the considerations mentioned by my Hon'ble Colleague Mr. Chadwick in his note of the 27th instant and have again given my best consideration to the language adopted in the last paragraph of Article VII of the Afghan Treaty. My duty is, of course, confined to a correct interpretation of that paragraph as it stands. In arriving at a correct conclusion regarding the intention of the High Contracting Parties, primarily the language adopted in the Treaty must be looked at—although the surrounding circumstances of the case may be taken into consideration in order correctly to interpret that language. Now the paragraph in question begins by saying that " the British Government declares that it has no present intention of levying Customs duty on goods or livestock of Afghan origin or manufacture, imported by land or by river into India ", etc., etc. The declaration embodied in this part of the paragraph in question is specific and admits of no doubt whatever. The clause then proceeds " In the event, however, of the British Government deciding in the future to levy Customs duties on goods and livestock imported into India by land or by river from neighbouring States it will, if necessary, levy such duties on imports from Afghanistan." The expression " neighbouring States " may mean, (*a*) States neighbouring to Afghanistan, (*b*) States neighbouring to India, or (*c*) States neighbouring both to Afghanistan and to India. On reconsideration, I agree with my Hon'ble Colleague that the more reasonable interpretation of this expression is that the States intended therein were States neighbouring to Afghanistan and India ; *i.e.*, States in the neighbourhood of the two Contracting Parties. Taking this as the correct interpretation, what is the meaning of the opening words of this sentence " in the event, however, of the British Government deciding in the future to levy Customs duties ", etc. ? These words seem to me to exclude from consideration, when applying this particular clause in the Treaty, Customs duties, if any, which were already imposed on goods and livestock imported into India from such neighbouring States before

the date of the Treaty itself. This seems to me to be clear from the language of the preceding sentence read together with the opening words of the sentence in question. The correct interpretation of the clause then is that while the British Government has thereby declared that it has no present intention of levying Customs duties on goods or livestock of Afghan origin or manufacture, imported by land or by river into India or exported from Afghanistan to other countries of the world through India and the import of which into India is not prohibited by Law, it has reserved to itself the right, if necessary, of levying Customs duties on imports from Afghanistan should it decide in the future to levy such duties on goods and livestock imported into India by land or by river from States neighbouring to India and Afghanistan. But, in that event, it would not charge a higher rate on imports from Afghanistan than the lowest rate charged on imports from any neighbouring State. This, to my mind, is, on reconsideration, the correct interpretation of this clause and, as I have said above, it is only with its interpretation that I am concerned as Law Member.

II.

(11th April, 1924.)

It is unfortunate that the additional facts now brought to light were not before me when I wrote my note of the 30th November last modifying the view which I expressed in my earlier note of the 22nd November.

2. As to the first point raised by Colonel Humphrys in (S. No. 8), I have no doubt whatever about the correctness of the position adopted by him. As has now been pointed out by Mr. Howell, in his note of the 21st December, the authoritative version of the Anglo-Afghan Treaty is the one in the Persian language. The word " *duwwul* " as used in the Persian version of the Treaty is a plural of the word " *daulat* ", and it is unquestionable, to my mind, that it means "a Sovereign " or an " Independent State." " *Duwwul-i-ham-jawar* " as used in the Treaty, therefore, means neighbouring Sovereign or Independent States. Swat, Bajaur, Draband, Kohistan Hills, and Independent Tribal Territory can in no sense whatever be regarded as " *Duwwul-i-ham-jawar* " or neighbouring Sovereign States. On this ground alone, therefore, the mere fact that customs duty has been imposed on logs imported into India from these so-called States would not justify imposition of duty on logs imported from Afghanistan. Moreover, it seems to me that it would not be legitimate to hold that ' India ', in this clause, is used in the limited sense of British India as defined in our Statutes. Such a narrow construction would not, to my mind, be justifiable on any logical ground, whether we take the word ' India ' in its geographical sense or in its statutory sense as

defined in Section 3 (27) of the General Clauses Act and Section 18 (5) of the Interpretation Act. The territories in question, being all on our side of the Durand line, are in India, and cannot, therefore, be regarded as "neighbouring States" in relation to India. On both these grounds, therefore, the contention put forward by Col. Humphrys in regard to this particular aspect of the question is perfectly sound.

3. On the second question raised by Col. Humphrys, the modified view adopted by me in my note of the 30th November was the result mainly of the considerations to which my attention was invited by Mr. Chadwick. On the facts now mentioned in Mr. Howell's note and by Col. Humphrys, I am inclined to hold that the view adopted by me in my earlier note was correct. But it is hardly necessary to enter into a detailed consideration of that point, for in view of the fact that no import duty has as yet been imposed upon logs brought into India from Independent neighbouring States, it is obvious that the contemplated action cannot, under the terms of the Treaty be taken with regard to logs imported from Afghanistan. The second question, therefore, strictly speaking, does not arise.

No. 26.

PROPOSED AMENDMENT OF THE INDIAN LEGISLATIVE RULES IN REGARD TO BILLS DEALT WITH UNDER SECTION 67B OF THE GOVERNMENT OF INDIA ACT, AND IN RESPECT OF BILLS PENDING IN THE INDIAN LEGISLATURE WHEN ONE CHAMBER IS DISSOLVED.

(5th January, 1924.)

(Legislative Department File No. 112 General of 1924.)

THE Secretary of State's telegram raises two important questions, one of interpretation and the other of policy, and I propose to deal with both separately.

I am unable to agree that the existing position, admirably discussed by Mr. Graham in his note of the 29th October last, is inconsistent with the provisions of Section 63 of the Government of India Act. According to that section, the Indian Legislature consists of the Governor General and the two Chambers, *i.e.*, the Legislative Assembly and the Council of State, and " except as otherwise provided by or under this Act, a Bill shall not be deemed to have been passed by the Indian Legislature unless it has been agreed to by both Chambers either without amendment or with such amendments only as may be agreed to by both Chambers." From a careful perusal of the provisions embodied in this section, it is clear that the *interim* dissolution of either of the two Chambers does not legally affect the validity of a Bill which, under that section, depends upon agreement between the two Chambers either without amendment or with such amendments only as may be agreed to by them. I agree with the view expressed by Mr. Graham in paragraph 3 of his note referred to above that " the Chamber now in course of election is as much the Legislative Assembly as its predecessor ", and, in consequence, in so far as agreement between the two Chambers is concerned, it is immaterial to the validity of a Bill whether such agreement is arrived at between them before the dissolution of either Chamber or after its dissolution and re-election. In either case, the requirements of the Statute are satisfied, the Bill being agreed to by the two Houses of the Indian Legislature and, therefore, valid in law. It seems to me, therefore, that Standing Order No. 4 (2) is in no way inconsistent with Section 63 of the Government of India Act. And as Rule 25 of the Legislative Rules requires that " Every Bill which has been passed by the originating Chamber shall be sent to the other Chamber and copies of the Bill shall be laid on the table at the next following meeting of that Chamber ", I agree with Mr. Graham and the two Presidents in holding

that a Bill which was introduced in and passed by the Legislative Assembly must be laid on the table at the next following meeting of the Council of State and dealt with in that Chamber according to the ordinary procedure and the fact that meanwhile the Legislative Assembly has been dissolved does not affect the matter.

Turning now to the question of policy. It seems to me that where a Bill introduced in either House and finally passed by it is also accepted by the other House without amendment, the requirements of Section 63 of the Government of India Act are perfectly satisfied and the fact that the originating Chamber, whether it be the Legislative Assembly or the Council of State has meanwhile been dissolved, is absolutely immaterial. Apart from the provisions of the section in question, I can conceive of no *a priori* ground for holding that in such a case, dissolution of the originating Chamber subsequent to the passage of the Bill by it should have any effect on its validity in case it is accepted without amendment by the other chamber. On the other hand, if the originating Chamber itself is dissolved before a Bill introduced therein has passed through the various stages after introduction and before its final passage, it is clear that the Bill has not been accepted even by one House and, therefore, ought to be considered as dead and should require re-introduction either in the same Chamber when re-constituted or in the other Chamber and should, thereafter, be passed by both the Chambers before it can become law. This is clear from the provisions of Section 63 of the Act and is also consistent with *a priori* considerations. Difficulty arises only when a Bill passed by the originating Chamber is modified in some respects by the other House, the originating Chamber having, meanwhile, been dissolved; should the amendments thus made by the second Chamber be accepted by the re-constituted first Chamber, it is clear that the Bill as a whole has received the acceptance of both Houses and its validity is, therefore, unquestionable. A different position will, however, arise in case the re-constituted first Chamber refuses to accept the modifications introduced in the Bill by the second Chamber, and it is here alone that it becomes necessary to determine the question of policy. Although, technically, there is a remedy even under the existing procedure for such a state of things, nevertheless I am of opinion that here we should meet the views embodied in the Secretary of State's telegram by framing a new rule laying down that in such a case the Bill in question will be considered as dead, necessitating re-introduction and passage *de novo* through the two Houses before it can become law. In other cases, as I have observed above, the existing procedure, being perfectly valid and consistent with general principles, ought to be adhered to. The whole difficulty, as has been pointed out by Sir Henry Moncrieff Smith, arises from the fact that the life-time of the two Chambers

in India is not co-existent ; but, save and except in the one case herein referred to, it seems to me that neither the requirements of law nor *a priori* considerations necessitate any change in our existing rules.

The question arising on the Secretary of State's telegram having already been considered and decided in a meeting of the Council, it will be necessary to bring it before the Council for re-consideration.

No. 27.

QUESTION WHETHER INCOME DERIVED FROM AGRICULTURAL LANDS IS SUBJECT TO INCOME-TAX.

(28th February, 1924.)

(Legislative Department unofficial No. 523 of 1924.)

As is clear from the marginal notes, I agree with Mr. Graham in holding that in so far as lands sold under Lord Canning's Rules are concerned, the question is merely one of fact. These lands were sold free of land revenue assessment, and, in consequence, under the definition of "agricultural income" as given in section 2 of the Income-tax Act, 1922, the sole question is whether they are, as a matter of fact, "subject to a local rate, assessed and collected by officers of government as such". If the lands are subject to a local rate so assessed and collected, the income derived therefrom is agricultural income and is, therefore, not liable to income-tax. On the other hand, should such lands be not subject to a local rate, the income derived therefrom would be liable to income-tax.

2. But as regards "lands granted previously on which the land revenue has been redeemed under Rule 23 of Lord Canning's Rules", I regret I am unable to agree with Mr. Graham.

It is quite true that, as a general rule, the principle of literal construction must be followed in interpreting the language of a statute. As is pointed out by Maxwell in his work on the "Interpretation of Statutes" (Chapter I, section 2, page 3), "the first and most elementary rule of construction is, that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and, otherwise, in their ordinary meaning; and, secondly, that the phrases and sentences are to be construed according to the rules of grammar". But where "adequate grounds are found, either in the history or cause of the enactment or in the context or in the consequences which would result from the literal interpretation", departure from literal interpretation is justified on the ground that "such interpretation would not give the real intention of the legislature". The fundamental principle in such cases has been stated as follows :—

> "In construing Wills, and indeed Statutes and all Written Instruments, the grammar and ordinary sense of the words has to be adhered to, unless that would lead to absurdity, or some repugnancy or inconsistency with the rest of the instrument; in which case the grammatical and ordinary sense of the

words may be modified so as to avoid that absurdity, repugnancy, or inconsistency, but no further."

(Per Lord Wensleydale, *Gray* v. *Pearson* 6 H. L. Cas. 106) Jarvis, C. J. in Matheson *v.* Hart (1854), 23 L. J. C. P. 108 at p. 114, observes that " we ought.....to give to an Act of Parliament the plain, fair, literal meaning of its words, where we do not see from its scope that such meaning would be inconsistent, or would lead to manifest injustice."

3. Now, reading the definition of " agricultural income " in section 2 of the Act, together with the provision of section 4 (3) (*viii*), it is clear to me that the intention of the legislature was that income derived from land should not be liable to income-tax where the proprietor or occupier pays land revenue assessment on such land. In other words, it was considered inequitable by the legislature that the proprietor or occupier of a land should have to pay land revenue assessment and on the top of it should also be liable to payment of income-tax upon income derived by him from such land. That being, to my mind, clearly the intention of the Statute, I am not forced to apply the rule of literal construction, even if that rule could be applied in the manner suggested by Mr. Graham, if such application would result in manifest injustice or would be inconsistent with the intentions of the legislature. Where land is, at the time of grant, actually assessed to land revenue, and under the rules permitting the same the land revenue is commuted by payment of a lump sum, it is clear that the land is not held free of land revenue assessment either by reason of its remission or by grant free of land revenue. In such a case, the land is assessed to land revenue ; all that has happened is that instead of paying land revenue assessment yearly or half-yearly as is ordinarily the case, it has been paid for all time in lump. The land, therefore, is assessed to land revenue within the meaning of the Act. To hold otherwise would result in not only manifest injustice, but would defeat the intention of the legislature. It follows, therefore, that in my view, income derived from this class of lands is not subject to income-tax.

No. 28.

INTERPRETATION OF THE WORD 'QUALIFICATIONS' IN SECTION 36 (5) OF THE GOVERNMENT OF INDIA ACT.

(28th April, 1924.)

During the preliminary conversations which took place at the first meeting of the Constitutional Reforms Committee held on Tuesday the 22nd instant, there was some discussion regarding the correct interpretation of the word "qualifications" as used in Section 36 (5) of the Government of India Act. The two points then discussed were (*a*) whether membership of a Chamber of the Indian Legislature through election could be regarded as a qualification within the meaning of the sub-section; and (*b*) whether a Rule could be legally framed laying down that a certain proportion of the Members of the Executive Council should be Indians. After some discussion, my Hon'ble Colleague Sir Alexander Muddiman, Chairman of the Committee, asked me to give the Committee a note embodying my opinion on the two points mentioned above.

The expression "qualification" has not been defined in the Act itself; nor is it a technical word bearing a particular meaning in scientific language. In these circumstances, the Rule of Interpretation is well recognised. "The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and, otherwise, in their ordinary meaning; and, secondly, that the phrases and sentences are to be construed according to the rules of grammar .....If there is nothing to modify, nothing to alter, nothing to qualify, the language which the Statute contains, it must be construed in the ordinary and natural meaning of the words and sentences". (Maxwell on the Interpretation of Statutes, Section II, pages 3 and 4). This proposition of law is so well settled as to make it unnecessary for me to multiply authorities in its support. According to Mozley and Whiteley's Law Dictionary, the word "qualification" means "that which makes a person eligible to do certain acts or to hold office". According to Webster, the word means "an enabling quality or circumstances", "requisite capacity or possession". The Concise Oxford Dictionary defines the word as meaning "condition that must be fulfilled before right can be acquired or office held".

Now, the word "qualification" has been used in more than one section of the Act and "it is an elementary rule that construction is to be made of all the parts together and not of one part only by itself.....Such a survey is often indispensable even when the words are the plainest; for the true

meaning of any passage is that which (being permissible), best harmonises with the subject and with every other passage of the Statute" (Maxwell, Section IV, page 54). Under Section 64 (1) (*c*) and (*d*), rules may be framed as to the "qualification" of electors and members of the two Houses of the Central Legislature respectively. Rule 8 (1) of the Electoral Rules for the Indian Legislature lays down that the qualifications of an elector for a general constituency shall be such qualifications based on, among other things, "community". And we find that membership of one or other of the various communities has been made a *sine qua non* for being either a voter or a candidate for membership in certain constituencies. Section 129-A (3) requires that rules framed under the Act shall, "in the absence of a special provision, be laid before both Houses of Parliament as soon as may be after they are made". And this, I presume, was done in the case of these Electoral Rules. In these circumstances, Parliament, which must be taken to be the best interpreter of the language used by it in the Act, must be presumed to have approved of these Rules.

Applying the two principles mentioned above, it seems to me that there can be no reasonable doubt that membership, through election, of the Indian Legislature or membership of a community is a qualification within the meaning of Section 36 (5) and provision can, therefore, be legally made by rules under the Act prescribing either of these as a qualification to be required in respect of the members of the Governor-General's Executive Council. The rule of "*ejustem generis*" does not, to my mind, apply to a correct interpretation of this sub-section. Indeed, when we bear in mind the fact that the recommendation of the Joint Select Committee with regard to Clause 28 of the Bill was that "not less than three members of the Council should be Indians" and instead of embodying that recommendation in the Statute, sub-section 5 was enacted so as to leave this and other matters of analogous character to be determined by rules, it seems to me to be clear that it is legally permissible to frame rules along the lines mentioned above.

A reference to the provisions of other Statutes as aid in interpreting this particular provision in the Government of India Act is permissible only if the former are in *pari materia* and, therefore, the sense in which the word "qualifications" is used in Statutes such as the Indian Merchant Shipping Act, 1859, etc., is of no help to us in construing the meaning of the word as used in the Government of India Act.

I am at this stage concerned only with the legal possibility, from a constitutional point of view, of the suggested rules being framed under the provisions of Section 36 (5). Whether it is advisable or not to frame such rules is a matter for subsequent discussion.

No. 29.

PROPOSED AMENDMENT OF ARTICLE 5 OF THE FIRST SCHEDULE OF THE INDIAN LIMITATION ACT, 1908.

(11th July, 1924.)

(Legislative Department unofficial No. 554 of 1924.)

The answer to the question put to us by the Home Department is, I confess, not free from difficulty. The Summary Procedure on Negotiable Instruments, as contained in Order XXXVII, was enacted by the Legislature itself under Section 121 of the Code of Civil Procedure and has, according to the express language used in that section, effect as if enacted in the body of the Code. Moreover, that procedure applies to suits on Negotiable Instruments instituted *only in certain Courts named in Clause 1 of the Order.* On the other hand, under Section 122, the Code of Civil Procedure empowers the High Courts from time to time, after previous publication, to make rules regulating their own procedure *and the procedure of all Civil Courts subject to their superintendence.* Sections 121 and 122 read together make it clear that the High Courts may annul, alter or add to all or any of the Rules in the 1st Schedule, including the Rules relating to Summary Procedure on Negotiable Instruments embodied in Order XXXVII. And Section 128 requires that the Rules which the High Courts are empowered to make shall be not inconsistent with the provisions in the body of this Code but, subject thereto, may provide for any matters relating to the procedure of Civil Courts. By sub-section 2 of this section, such Rules may provide for, *inter alia,* (F) Summary Procedure in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising on a contract express or implied, or on an enactment where the sums sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty, &c., &c. It is clear, therefore, that the Summary Procedure laid down in Order XXXVII, to be adopted in the particular Courts named therein, in suits on Negotiable Instruments will continue to be the procedure to be followed by those Courts until it is annulled, altered or added to in pursuance of the power conferred on the High Courts under Section 122 read together with Section 128 of the Code of Civil Procedure. In other words, it is conceivable that the Summary Procedure laid down in Order XXXVII may, in the absence of any rules framed under Section 128 (2) (*f*), be the only procedure extant regulating the trial of suits specified in that Order in the Courts mentioned therein. Whatever may have been the intention of the Legislature, would article 5 in the 1st Schedule of

the Indian Limitation Act, IX of 1908, apply in those circumstances ? According to the express language used in that Article, the period of limitation is six months for the institution of suits " under the Summary Procedure referred to in Section 128 (2) (*f*) of the Code of Civil Procedure, 1908 ". The Article, in its express terms, refers to Summary Procedure referred to in Section 128 (2) (*f*), *i.e.*, procedure to be laid down by High Courts under their rule-making power as provided in the section referred to above, and not to the Summary Procedure embodied in Order XXXVII. If the intention was to include the latter as it seems to me from what has been said by Mr. Wright in his note above probably it was, there is, to my mind, justification for contending that that intention has not been actually carried out. It is, therefore, difficult to hold that the doubt entertained by the Bombay High Court in regard to this matter is not justified and it seems to me that the better course is to remove that doubt by introducing appropriate amendment in Article 5 (1st Column) of the Indian Limitation Act of 1908. In this connection, it must be borne in mind that, as has often been ruled by our Courts Statutes of Limitation must be construed strictly (No. 57, P. R. 1905, F. B., at page 196 ; No. 26, P. R., 1911, F. B. at page 71 ; I. L. R., 181, All., at page 486, &c., &c.). And the principle is well established that the provisions of an article in the Limitation Act cannot be extended to suits which are not covered by its express language.

No. 30.

SUCCESSION TO THE TALUQA OF RAI SANKLI, IN THE BOMBAY PRESIDENCY.

(5th August, 1924.)

(Legislative Department unofficial No. 682 of 1924.)

On the 25th February 1905, Ambavidas Jiwabhai, Talukdar of Rai Sankli, executed a registered Deed of Adoption in favour of Gordhanbhai Kashibhai, the youngest of his daughter's sons. That Deed recited that the boy had been adopted the day before its execution, *i.e.*, on the 24th February 1905, "in the presence of kinsmen and relatives and family members and castemen and a circle of friends.....in accordance with the custom of my caste and family". The Deed in question was attested by a large number of persons, including Chaturbhai Kashibhai, respondent, against whose appointment by the Government of Bombay as Talukdar of Rai Sankli the present Appellant Chivabhai Chhagabhai has presented this memorial to the Governor General in Council. On his adoption, Gordhanbhai Kashibhai was named Gopaldas, the adoption was recognised by the Bombay Government, and that Government proposed to sanction the succession of the adopted son as desired by Ambavidas [see letter No. 1682, dated 16th March 1910 from Mr. (now Sir) James DuBoulay, Secretary to the Government of Bombay, Political Department, to the Secretary to the Government of India in the Foreign Department]. As an enclosure to that letter is an application by Ambavidas to the Political Agent, Jhalavad praying for recognition by Government of this adoption which, according to both these letters, is said to have been made in the presence and with the consent of his relations. A copy of the Deed of Adoption mentioned above is also printed in these Proceedings. In reply to the Bombay Government letter, the Foreign and Political Department sent a telegram (No. 632-I.A., dated 31st March 1910), in which occur the following words :—"It is presumed that the male members of the family have formally signified their assent to the application of the rule of primogeniture in writing. On this understanding, action proposed by Bombay Government is approved". With reference to this telegram, Mr. C. A. Kincaid, Secretary to the Bombay Government, addressed a letter, No. 3464, dated 22nd May 1911, to the Secretary to the Government of India in the Foreign Department in which, while observing that no question of primogeniture can arise, he continued to observe : "Now even if there had been no adoption, then Gopaldas and his three brothers would have, as daughter's sons, excluded under ordinary Hindu law all agnates. Now of these three brothers, one Chotabhai was a lunatic. A second Chunilal was given in

adoption to another branch of the family. *The remaining brother Chaturbhai gave his written consent to Gopaldas' adoption.* Thus the recognition of Gopaldas' adoption prejudices no one else's interests. The only question remains whether a daughter's son can be adopted. It has been held by the Bombay and Madras High Courts that such an adoption is valid if sanctioned by custom. The report of Major Coghill appended hereto established that *in the Rai Sankli family such a custom exists.*" According to paragraph 2 of this letter, His Excellency the Governor in Council " sanctioned the succession of Gopaldas to the Taluka of Rai Sankli " and went on to say that " *in view of his adoption, the succession must be deemed to be in the direct male line and no nazarana is recoverable* ".

2. From the facts mentioned above, it is perfectly clear that *Gopaldas succeeded to this Taluka as the adopted son of Ambavidas.* And it is an entire misapprehension of the facts of this case to say that Gopaldas succeeded to the Taluka by a double title. Had this adoption not taken place, Gopaldas might have inherited a share of the Taluka, for, as a daughter's son, he would have been only one of two persons entitled to the inheritance under Hindu Law. His succession as Talukdar, after the death of his adoptive father, was the result exclusively of the adoption referred to above. Now it is a recognised principle of the Hindu Law of Inheritance that " on a property descending to a male heir, he becomes a fresh stock of descent and *the property passes to his own heir and not to the heir of any previous owner* " (Dr. H. S. Gour's Hindu Code, section 238). That principle has, as is pointed out by the Officiating Joint Secretary in paragraph 5 of his note, been applied by Their Lordships of the Privy Council even to the case of a daughter's son (Indian Law Reports 19, Mad. 451). According to the Hindu Law, therefore, on Gopaldas' death, it is his heirs and not the heirs of his adoptive father who would have any right to succeed to this Taluka. It follows, in consequence, that on his removal from the *gadi* the question for our decision is : who is his rightful heir and, in the absence of any disqualification personal to him, the latter ought, in justice and equity, to be recognised as the next Talukdar. Now whatever claims the respondent Chaturbhai may have had to this Taluka, had Gopaldas not been adopted by their maternal grand-father, the previous Talukdar of Rai Sankli, under Hindu Law *he is not an heir of Gopaldas in the presence either of his male lineal descendants or his male agnates.* He is only a *Bandhu* or a cognate relation and would have the right to succeed Gopaldas only if there were no *Sapindas, i.e.,* male agnates within the seventh degree on the father's side, and *Samanodaks, i.e.,* more distant male agnates (See section 251, *Ibid*). It is clear, therefore, that as against the memorialist Shivabhai Chhagabhai who is a male agnate of

Gopaldas and his adoptive father, the respondent Chaturbhai has no claim to the Taluka. There is no doubt whatever that Gopaldas succeeded to this Taluka by virtue of his adoption by the previous Talukdar and not as the latter's daughter's son and, in consequence, the succession would now be to him and not to his adoptive father. Chaturbhai, as the daughter's son of the latter, therefore, has no claim to succeed Gopaldas in the presence of heirs who, under Hindu Law, have undoubtedly superior right of inheritance.

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No. 31.

(1—II.)

THE GOVERNMENT OF INDIA AND THE ADVOCATE-GENERAL OF BENGAL.

I.

(6th September, 1924.)

THE arrangement whereby the Government of Bengal and the Government of India had a common staff of Advisers for the purpose of carrying on their legal business dated back to the period of the East India Company. Of the 9 Law Officers through whom, in the old days, the legal business of the two Governments was conducted, the Advocate-General occupied the position of the Chief Legal Adviser. Prior to the year 1858, he was, in common with the two Advocates-General of the Presidencies of Bombay and Madras, appointed by the Directors of the East India Co. with the approval of the Commissioners for the Affairs of India. In 1858, this power of appointment was transferred to the Crown and thereafter, the 3 Advocates-General were appointed by Royal Sign Manual. In his letter dated the 6th May 1859, Mr. Ritchie, the then Advocate-General of Bengal, while expressing his views as to the duties of the Advocate-General with special reference to the Presidency of Bengal, observed, *inter alia*, as follows :—

> " The Advocate-General for the Presidency is the responsible legal adviser and the leading Counsel of the Governments of India and of Bengal. It is his duty to advise both of those Governments in all matters they may think fit to consult him upon, or undertake any legal business within the range of an Advocate's functions, which either Government may desire him to undertake within Calcutta, and to represent the Government in all actions or legal proceedings in the Supreme Court, or in any Court in the Presidency deriving jurisdiction from the Crown direct. "

That view regarding the duties of the Advocate-General of Bengal has, more or less consistently, been accepted in the past.

2. In view of the fact that prior to 1912, Calcutta was the Imperial Capital as well as the Headquarters of the Government of Bengal, this arrangement was, on the whole, both economical as well as free from inconvenience in so far as the legal business of the two Governments was concerned. The status occupied by the Advocate-General of Bengal, together with the fairly liberal emoluments attaching to his office, made the

position attractive not only to the leaders of the Provincial Bar, but also to English Barristers of ability from England.

3. But, along with that arrangement for obtaining legal advice, there was also the Legislative Department within the Secretariat organization of the Government of India itself, with the Law Member of His Excellency the Viceroy's Executive Council at its head, from whom the various administrative departments of the Government of India could obtain legal advice whenever necessary. With two high legal authorities thus available to the Government of India, for the purpose of obtaining legal advice, it became necessary to frame a Rule of Business which would be consistent with their respective positions and would avoid difficulties arising from possible professional complications. Accordingly, Rule 17 of the Rules of Business authorized the Executive Departments in the Government of India to consult the Legislative Department on certain subjects specified in that Rule and, at the same time, added a proviso that "the Legislative Department shall not be asked to advise on cases on which the Advocate-General of Bengal has advised." The object of this proviso was, no doubt, to secure that "where there is any chance of litigation, the Law Officers (who must have charge of the matter if and when it is brought into Court) should be consulted at the earliest possible stage". But while the proviso to this Rule expressly laid down that the Legislative Department should not be asked to advise on cases on which the Advocate-General of Bengal had already advised, it has, as a matter of practice, been the almost invariable rule in the Government of India Secretariat that where the advice of the Legislative Department had already been taken on any question, the Law Officers should not be consulted thereon. Indeed, in the year 1907, Sir Erle Richards, the then Law Member, went so far as to claim that in such a case there was no right to consult the Law Officers (see Legislative Department unofficial No. 73 of 1907). It must, however, be noted that many years before, in his ruling dated the 28th June 1893, Lord Lansdowne, the then Viceroy of India, had taken a contrary view which, however, was not acquiesced in by Sir Alexander Miller, the then Law Member (see Legislative Department unofficial No. 72 of 1893). These proceedings are of considerable interest in connection with the subject-matter of this note.

4. In his note, dated the 20th May 1893, Sir Alexander Miller observed as follows (see page 8 of the printed proceeding) :—

> "I am sorry to be obliged, for the third time, to enter my protest against what I cannot but consider as not only a breach of the spirit—not of the letter—of the Rules of Business but a very grave discourtesy to this Department.

Years ago, Sir Dennis Fitzpatrick, when Secretary of this Department, pointed out the inconvenience of referring cases to it in which the Law Officers had expressed an opinion, on the ground that, whether we agreed with them or not, the position was equally invidious. The rules now, whether in consequence of that opinion or not I do not know, provide that this Department is not to be consulted in any case where the Advocate-General has advised. The same principle clearly applies to the converse case, though the rule is not so expressed. * * * *

* * * * *

I do not suppose that any discourtesy was intended, any more in this case than in the former cases in which I was compelled to make a similar protest, but none the less I feel that it is impossible for this Department to advise, subject to an appeal to what is in effect a subordinate authority. I have no desire to go the length of asking for an alteration in the Rules of Business to prohibit the practice in terms, but I repeat, what I have had to say before, that I will respectfully but positively decline to note upon unofficial references, if in the result the cases are liable to be treated, without the concurrence of this Department, in the manner indicated in paragraph 2 of Mr. Crawford's note of 19th October, 1892."

On the case being submitted to Lord Lansdowne, His Excellency, in his note dated the 28th June 1893, observed as follows :—

"It is quite true that, under the Rules of Business, the Legislative Department may not be asked to advise on cases on which the Advocate-General of Bengal has advised already. The object of this rule is, I conceive, to throw the entire responsibility for advice as to the legal aspect of a properly submitted case on the Advocate-General, and perhaps to prevent the Law Officer from endeavouring to shelter himself behind the Legislative Department. Be that as it may, I see no reason to suppose that the converse rule must hold good, and that the Advocate-General shall not be asked to advise on cases in which the Legislative Department has already advised. It seems to me of the utmost importance that the Executive Department should be free to refer a point unofficially to the Legislative Department, without thereby precluding themselves

from taking the opinion of the Law Officers at a later stage should it seem desirable to do so."

On the file coming back to the Legislative Department, Sir Alexander Miller recorded a note, dated the 25th August 1893, which is printed at pages 12—14 of these Proceedings. In his note, Sir Alexander Miller traced the origin of the proviso to Rule 17 of the Rules of Business and having referred to the difference of opinion which had arisen in 1872 between the Finance Department and the Legislative Department [presided over at that time, by Mr. (subsequently, Lord) Hobhouse] with reference to this question, cited the ruling of Lord Northbrook, the then Viceroy, in which His Excellency agreed with Mr. Hobhouse that "the Legislative Department should not be called upon to advise upon opinions given by the Advocate-General. In any future case of the kind the papers should be sent to me, and I should probably refer them for the opinion of the Legal Member of Council." Having concluded his narrative of the previous proceedings in which this question had arisen, Sir Alexander Miller proceeded to make the following remarks.

"(1) There does not appear from beginning to end of the discussion any trace of the distinction between the functions of this Department as *unofficial*, and the Advocate-General as *official*, advisers of the Government. On the contrary, the contention of this Department, agreed to by Lord Northbrook, treated them as co-ordinate and independent advisers, who ought not to be exposed to the risk of being brought into conflict with each other, though the Viceroy intimated that he would probably, if and when occasions arose, refer the case, on appeal from the Advocate-General's opinion, to the Law Member personally, not to the Legislative Department. This is in accordance with the fact that the Law Member is the official superior—and, except His Excellency the Viceroy, the only official superior—of the Advocate-General of Bengal.

(2) The whole of Sir D. Fitzpatrick's reasoning applies even more forcibly to the converse case where the Legislative Department has advised first than to the case before him, where the Legislative Department was asked to decide between conflicting opinions of the Advocates-General of Madras and Bengal."

With all deference to the opinion expressed by Lord Lansdowne, I venture to submit that the position adopted by Lord Hobhouse, Sir Alexander Miller and Sir Erle Richards

and, as shown above, accepted by Lord Northbrook, is incontrovertible.

5. From what has been said above, it will be noticed that even during the period when Calcutta was the Imperial Capital of India, cases had arisen which indicated that the arrangement then existing whereby the Governments of India and of the Bengal Presidency had a common staff of legal Advisers was not an ideal one. Nevertheless, in the then existing conditions, the arrangement, on the whole, worked without any real detriment to the legal business of the Government of India. That position, however, underwent a distinct change when the Capital of India was transferred from Calcutta to Delhi.

6. For a time, after the transfer of the Imperial Capital to Delhi, the old conditions continued to exist. In 1915, however, the Home Department began to tackle the problem and a letter No. 891, dated the 30th July 1915 was issued to the Government of Bengal intimating the view of the Government of India that in consequence of the transfer of the Government of India to Delhi and the opening of the Patna High Court, the time had come when the Advocate-General of Bengal should, as in Madras and Bombay, become a purely provincial officer, the Government of India merely retaining the right to consult or brief him on the payment of fees according to a maximum scale in individual cases should they desire to do so. The Governor in Council was asked to consider the question of the emoluments and personnel of future incumbents of the post of Advocate-General from this point of view. The reply of the Bengal Government will be found in Legislative Department unofficial No. 255 of 1916. It is unnecessary for the purposes of this note to summarise the views of the Local Government as embodied in that letter or to review the noting which took place thereon in the Home, Legislative and Finance Departments. As a result of that noting there was a discussion among Sir Reginald Craddock, Sir William Meyer, Mr. (now Sir) George Lowndes (Home, Finance and Law Members), and Mr. (now Sir) Alexander Muddiman and Mr. (now Sir) Henry Wheeler (Legislative and Home Department Secretaries), when it was agreed that " the Advocate-General, Bengal, should, in future, become a provincial officer, the Government of India reserving the right to consult him (or anybody else) if they wish to do so." (See page 8 of the printed Proceedings mentioned above.) But this still left the questions relative to the Government Solicitor for decision. It was recognised that the position as regards him, since the move to Delhi, was anything but satisfactory. The idea of replacing him by a Solicitor to be attached to the Legislative Department had more than once been mooted but never acted upon. It would, however, assume prominence if the

Government of India took to stating cases for counsel's opinion ; and the whole question, it was agreed, merited further inquiry. For this and other reasons stated in the proceedings, it was decided to hold an inquiry by a strong Committee. Accordingly, what is known as the Law Officers Committee was finally appointed by a Resolution of the Government of India in the Home Department No. 826, dated the 4th August 1916, of which the Hon'ble Sir Basil Scott (Chief Justice, Bombay) was President ; the Hon'ble Sir William Vincent, at that time Member of the Executive Council of Bihar and Orissa ; and Mr. S. R. Das, the present Advocate-General of Bengal, were members ; the Legal Remembrancer of Bengal being Secretary of that Committee. The Report of that Committee will be found in the Home Department Proceedings Nos. 110-118 of August 1917. The Committee came to the conclusion that, in their view, the office of the Advocate General, Bengal, should not be provincialized as there were distinct advantages in maintaining its present status. The reasons for arriving at that conclusion are stated in paragraph 13 of the Report and will be dealt with later on in this note. This Report was noted on in the customary manner, in the Home, Legislative and Finance Departments, and the conclusion arrived at by the Committee, as mentioned above, with regard to the Advocate General, Bengal, was accepted. It is, however, significant that Mr. (now Sir) Alexander Muddiman, who was then Secretary in the Legislative Department, in his note dated the 19th October 1916, while agreeing to all the other recommendations of the Committee, stated that he still had great doubts with regard to its first recommendation that the Advocate-General should continue to be the principal Law Officer of the Government of India. As a result subsequent action, into the details of which it is unnecessary to enter for the purposes of this note, the recommendation of the Law Officers Committee that the Government Solicitor in Calcutta should also continue to be one of the Law Officers of the Government of India, which was acted upon for some time, was reversed and a separate Solicitor's Branch was constituted within the Legislative Department in the Government of India for the conduct of our legal business other than that which it is within the province of Counsel to transact ; and, thus, the much-desired improvement was effected in our machinery for obtaining legal advice.

7. In support of their recommendation that the Advocate-General, Bengal, should continue to be also the principal Legal Adviser of the Government of India, the Law Officers Committee enumerated four reasons which, according to them, justified the maintenance of the present status of the Advocate-General of Bengal as also the principal Adviser of the Government of India.

> " The first of these advantages ", they said, " is that of continuity, there being no reason to depart from

> the established tradition of the office. In the second place, there are in Calcutta various offices under the direct control of the Government of India which frequently need the service and advice of the Advocate-General. In the third place, we think it desirable that the Government of India should have some authoritative legal adviser to whom they can turn in the event of there being any doubt regarding the opinion given by a provincial law officer. Assuming that the Government of India should have some such adviser, it is probable that this officer will frequently be a member of the Calcutta Bar since Calcutta is the most important legal centre in India ; and there is no reason why the Government of India and the Local Government should have two separate advisers in the same city. Another reason for not provincializing the appointment is that it would be difficult for an office such as the Currency Office in Calcutta, which is under the direct control of the Government of India, to claim the free advice of the Advocate General of Bengal if he were purely a provincial officer. "

Neither individually nor cumulatively do these reasons for the opinion expressed by the Committee carry conviction to my mind. It is obvious that, in view of the radical change in the position of the Government of India and, in consequence, in the necessities of the situation in so far as the obtaining of legal advice by them is concerned as a result of the transfer of the Imperial Capital to Delhi, the argument of continuity is entirely irrelevant. Had Calcutta continued to be the Capital of India, and a proposal put forward in favour of the setting up of an independent machinery in the Government of India for the conduct of their legal business, this argument would have had considerable force. But it can, to my mind, have no relevancy when the old position, as a result of which the Government of Bengal and the Government of India had a common staff for obtaining legal advice, had entirely changed. Moreover, the moment we ceased to employ the Government Solicitor, Calcutta, as one of our law officers and instituted a Solicitor's Branch within the Government of India Secretariat itself, the argument of continuity lost whatever force it may have otherwise possessed. On the contrary, the new legal position thus brought into existence required that, for facility of reference and consultation, Counsel employed by the Government of India should be easily accessible to our Solicitors. The second ground cited by the Committee in support of their recommendation does not, I venture to think, bear examination. All the principal offices

under the Government of India, had, by the year 1917, been permanently transferred to Simla and Delhi. And though, as a result of want of accommodation in the New Capital the Government of India were obliged to leave some of their offices still in Calcutta, that position was merely temporary, likely to come to an end as soon as accommodation for all their offices was ready in the New Capital at Delhi. That position, more or less of a temporary character, ought not, in my judgment to have been allowed to influence the Committee's decision in a matter of such vital importance to the Government of India. At all events, the completion of the New Capital is now in sight and I have no doubt that, after the necessary accommodation for the Government of India offices has been provided in Raisina, the majority of, if not all, offices still left in Calcutta will be transferred to Delhi. The third argument is, I venture to submit, equally fallacious. Of course, the Government of India must have a Legal Adviser " to whom they can turn in the event of there being any doubt regarding the opinion given by a provincial law officer. " But why should they necessarily turn to a member of the Calcutta Bar for such advice and, in particular, when he happens to be himself a provincial law officer, I am entirely unable to appreciate. Indeed, the inconvenience caused by such an arrangement has only recently been manifested in connection with a certain important constitutional problem in Bengal, to which reference will be made later in this note. To have resort to the opinion of one provincial law officer when a doubt arises regarding the opinion given by another provincial law officer, appears to me to be opposed to all principles even of professional etiquette. The fourth argument adduced by the Committee in support of their recommendation is, to say the least inconclusive. Assuming that our currency office will continue to be a permanent fixture in Calcutta even after the rest of the Government of India offices have been housed in Raisina and assuming further that this particular office does occasionally need legal advice, it does not follow that simply for that reason, the whole of the Central Government should be compelled to go to Calcutta for the conduct of its entire legal business. On the other hand, I can see no reason why the Currency Office should not address our Law Officers at the Headquarters of the Government of India for the purpose of obtaining legal advice whenever necessary. It is significant that the Committee, in their Report, have given no facts and figures to show that the Currency Office had, prior to their inquiry, occasion to obtain the advice of the Advocate-General direct so frequently as to make it necessary to maintain the old relations between the Advocate-General, Bengal and the Government of India. On the other hand, it has been ascertained that during the whole of last year only one currency case was referred to the Advocate-General for opinion.

8. From what has been said above, it is clear that at least, in my opinion, the grounds cited in paragraph 13 of the Report by the Law Officers Committee did not furnish sufficient grounds for maintaining the old relations which existed between the Government of India and the Advocate-General, Bengal, when Calcutta was also the Imperial Capital after the transfer of the Capital from that city to Delhi. But there is one further observation which I would like to make with reference to the opinion formed by the Law Officers Committee in this connection. In arriving at their conclusion, they entirely ignored the other side of the shield. They did not, in their Report, at all deal with the difficulties and inconveniences the Government of India have to suffer on account of their going to a provincial law officer living a thousand miles away from their own headquarters for the conduct of their legal business. The delays in the disposal of work, even in ordinary cases, consequent upon such an unsatisfactory arrangement are obvious. But the consequence of such delay in urgent and important cases may occasionally result in serious injury to public interests. Moreover, in the existing circumstances, our Solicitor has some time to proceed to Calcutta in order to have personal consultation with the Advocate-General, Bengal, when a matter of sufficient importance arises necessitating such a course, thus adding additional expenditure to avoidable delay. And the spectacle of a great Central Government like that of the Indian Empire not having a self-contained machinery of its own for the conduct of its legal business and, in consequence, having to resort to a provincial law officer for legal advice is, to say the least, not one of which we can be proud.

9. To come now to the position which recently arose in Bengal on the Provincial Legislative Council rejecting the Educational Demand, including the Minister's salary, to which a brief allusion has been made above. It will be remembered that His Excellency the Governor of Bengal obtained the advice of the Advocate-General as to the remedies available to him in consequence of the constitutional position resulting from that rejection. Having obtained that advice, he publicly announced the course which he proposed to follow should the Provincial Legislative Council refuse to reconsider its decision. On his attention being invited to that announcement, His Excellency the Viceroy considered it necessary to examine the constitutional position. The principal Legal Adviser of the Government of India who was also the principal Legal Adviser of the Government of Bengal, having already recorded his opinion on this vital problem, on being called upon to do so by the Provincial Government, the Government of India could not have recourse to him for obtaining legal advice in this connection. His Excellency, therefore, was obliged to consult

the Legislative Department who gave an opinion contrary to that expressed by the Advocate-General, Bengal. The proviso to Rule 17, of course, did not prevent the Legislative Department being consulted in these circumstances, for it was not an Administrative Department of the Government of India itself which had consulted the Advocate-General of Bengal in the first instance and, in consequence, the rule laid down in the proviso did not apply. Moreover, under Rule 43 of the Rules of Business, it is open to the Governor General, from time to time, if he things fit, to permit any departure from these Rules. And, as was laid down by Lord Northbrook in the case to which reference has been made in an earlier part of this note, His Excellency the Viceroy can always consult the Law Member of his Executive Council in connection with any problem before the Government of India in which his legal advice may be necessary. But the fact remains that the difficulty which arose in this particular case, as a result of which the Government of India could not obtain the advice of their principal Legal Adviser, was the inevitable consequence of the unsatisfactory state of affairs existing at present whereby the Advocate-General, Bengal, is still, in spite of the transfer of the Imperial Capital from Calcutta to Delhi, officially the Central Government's principal Legal Adviser. What is the right solution of this difficulty ? With that question I propose to deal in a subsequent note.

II.

(30th October 1924.)

FROM the survey of the existing position as embodied in my previous Memorandum, it is abundantly clear that the complications and difficulties we have now to face in connection with our present machinery for legal advice are due mainly to the fact that the principal Legal Adviser of the Government of India is also the chief Law Officer of the Government of Bengal. It follows, therefore, that the only solution of this problem lies in the Government of India having an Advocate-General of their own who should occupy exclusively the position of their chief Legal Adviser. But in the existing conditions it is clear that we are not in a position to engage a whole-time officer for that purpose. Not only is there not sufficient work in the Government of India to justify the engagement of a whole-time Legal Adviser but the emoluments which the Central Government would have to pay to a lawyer of the requisite ability and standing, in order to induce him to give his whole-time to Government, would undoubtedly be prohibitive. Moreover, our own experience as well as the system obtaining in England makes it clear that the employment of a whole-time officer for this purpose is unnecessary.

The requirements of the case can be adequately met by the engagement of a leading lawyer as Advocate-General to the Government of India on terms analogous to those upon which the Advocate-General of Bengal is at present engaged as our principal Legal Adviser as well.

2. But even for that purpose, we have to go outside the circle of legal practitioners in Simla and Delhi in order to find a lawyer of the requisite ability and standing for this appointment. The District Bar in either of those two places does not provide us with suitable material for selection. It is, however, unnecessary for the Government of India to go as far afield as Calcutta in order to select a suitable lawyer for employment as their Advocate-General. There are, among the leaders of the Provincial Bars at Patna, Allahabad and Lahore, lawyers of acknowledged ability and eminence from among whom it would not be difficult to select a suitable incumbent for this post. Indeed, in making such a selection, the Government would be securing the advantage of comparative proximity to the Imperial Capital and if a lawyer of the requisite ability and standing could be selected from any of these places who would be likely to spend his summer vacations at Simla, Government would thereby secure the additional advantage of having their Advocate-General at the Headquarters of the Imperial Government at least for a few months every year. Moreover, as the summer vacations in these three High Courts coincide with the Autumn session of the Imperial Legislative Council, the advantages of such an arrangement are obvious.

3. The solution proposed above, however, is not, to my mind, an ideal one. Its adoption, no doubt, would secure for us, as our principal Legal Adviser, a lawyer who would not, at the same time, be the principal Law Officer of a Local Government. Moreover, he would be nearer the Imperial Capital than is the case at present. But the real and permanent solution of the difficulties we have to face lies in bringing into existence a state of things which would enable us to secure a lawyer of the requisite ability and standing as Advocate-General with the Government of India who would ordinarily reside at the Headquarters of the Central Government throughout the year.

4. For a long time past, there has been a growing feeling in legal and political circles in this country that India should possess her own Supreme Court of Appeal. Indeed, more than once, notices of resolutions advocating the institution of such a Court at the Headquarters of the Imperial Government have been given in the Legislative Assembly and been crowded out. Notice of a resolution to that effect has already been given for the next Delhi Session and I am credibly informed that this resolution will be sent in by a number of members of the Assembly in order to secure its finding a position in the

ballot box. The existing system of appeals to Their Lordships of the Privy Council in England in all cases above Rs. 10,000 in value, when a High Court reverses or modifies the decree of the Original Court or when a substantial question of law is involved in cases of concurrent judgments by the Indian Courts, entails an amount of trouble and expenditure to the Indian litigant which has given rise to a widespread feeling, among the educated circles as well as among the uneducated litigants, of dissatisfaction with the existing state of things. The appointment of one or two Indian Judges on the Judicial Committee of the Privy Council is not likely to remove that feeling. It is obvious that when responsible Government or Dominion Status is, in the process of time, conceded to India, a Supreme Court of Appeal will have to be established in this country. A beginning should now be made in that direction by the establishment of a Supreme Court of Appeal in India with jurisdiction to hear appeals in cases of value not exceeding one lakh of rupees, appeals in suits exceeding that value still lying to Their Lordships of the Privy Council. A large number of litigants will thus be relieved of the trouble and expenditure which they have to incur at present owing to their having to go to a Court of Appeal six thousand miles away from this country. The dissatisfaction at present existing in large circles as a result of the existing system will be removed and one more proof will thus be given to India of the earnestness of His Majesty's Government to advance India along the path leading to responsible Government. To start with, it would be sufficient to have a Supreme Court of Appeal consisting of a Chief Justice and two Judges, and the reform in question need not involve any extra burden on the Indian exchequer. In India the litigant is accustomed to payment of court fees on appeals to High Courts and the income derived from court fees on memoranda of appeals in the Supreme Court would, I am confident, cover whatever expenditure Government may have to incur in introducing this much-needed reform.

5. With the establishment of a Supreme Court of Appeal at Delhi and Simla, a Supreme Court Bar would come into existence likely to draw some of the leading lawyers from the existing Provincial Bars to the Headquarters of the Central Government. The Government of India could then select one of the leaders of the Supreme Court Bar for appointment to the post of their Advocate-General and would, in this manner, not only bring about a permanent solution of the difficulties and complications arising out of the present defective machinery for legal advice, but would also have taken the first step to bring the machinery for judicial administration in this country into line with the Australian system. This is, to my mind, the one scheme which offers a permanent solution of the

problem we have now to face and I earnestly advocate its adoption by the Government of India.

6. The solution suggested in the preceding paragraph will, of course, take time in its realisation. Meanwhile, the intermediate solution suggested towards the commencement of this Memorandum should, in my opinion, be adopted in order to meet our inmmediate requirements. As has been shown in my previous Memorandum, the present system of obtaining legal advice is full of complications and difficulties which ought to be put an end to as soon as possible.

No. 32.

THE BENGAL CRIMINAL LAW AMENDMENT ORDINANCE 1924, (QUESTION WHETHER UNDER SECTION 72 OF THE GOVERNMENT OF INDIA ACT, AN ORDINANCE CAN BE MADE AND BE LEFT TO BE BROUGHT INTO FORCE BY PROMULGATION ON SOME SUBSEQUENT DATE).

(9th October, 1924.)

(Legislative Department Confidential File No. 120-I of 1924-A & C.)

According to the language used in section 72 an Ordinance "made" under it shall, for the space of not more than six months from its "promulgation," have the like force of law as an Act by the Indian Legislature, etc., etc. To my mind, the language thus used makes it clear that the date of making the Ordinance and of its promulgation by the Governor-General need not be the same. The words "make and promulgate" in the earlier part of the section, which empowers the Governor General to take the two actions specified in cases of emergency, do not mean that the two things must necessarily be done by him at the same time or on the same day. The Ordinance made under the section comes into operation on the date on which it is promulgated and its operation lasts for the maximum period of six months, commencing from the date of its promulgation.

No. 33.

EQUALITY OF TREATMENT IN REGARD TO THE IMPORT OF GOODS FROM AFGHANISTAN INTO INDIA.

(13th November 1924.)

(Legislative Department unofficial No. 893 of 1924.)

It is quite true that the last paragraph of Article VII of the Anglo-Afghan Treaty does not deal specifically with the exact point raised in this case. Nevertheless, I have no doubt whatever that the intention of the clause was to secure equality of treatment to the Government of Afghanistan in the matter of goods imported by land or by river into India or exported from Afghanistan to other countries of the world through India. In other words, it appears to me that the intention was to levy customs duties on goods and livestock imported into India by land or by river from Afghanistan, whenever the British Government may decide to do so in the future, only to the extent to which such customs duties are levied upon imports from neighbouring States, non-prohibition by law, *i.e.*, by our law, of the import of such goods and livestock being the necessary condition in such cases. Bearing in mind, therefore, that the main obligation incurred by us under the Treaty is equality of treatment of Afghan goods with goods imported from other neighbouring States, the importation of which is not prohibited by law, the prohibition of import of a particular class of goods from Afghanistan into India, while such goods are permitted to be imported freely from other neighbouring States, would, to my mind, be contrary to the intention of the Treaty. It follows, therefore, that if the import of opium from Afghanistan is to be prohibited either by law or by rules having the force of law, such prohibition will have to be a general one affecting the import of opium from all neighbouring States, including Afghanistan, into India. There is no doubt in my mind that the expression "neighbouring States" does not apply to the Indian States situate, within the boundaries of India, and the prohibition would not affect these States.

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TO

NOTES AND MINUTES BY THE HONOURABLE SIR MIAN MUHAMMAD SHAFI, K.C.S.I., C.I.E.

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